United States Court of Appeals
for the
District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,211

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 23 1951
Joseph W. Stewart
CLERK

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY, a corporation, *Appellant,*

v.

THOMAS M. BROOKS, *Appellee.*

619

Appeal from Judgment of the United States District Court for the District of Columbia.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11211

RICHMOND, FREDERICKSBURG & POTOMAC
RAILROAD COMPANY, a corporation, *Appellant,*

v.

THOMAS M. BROOKS, *Appellee.*

Appeal from Judgment of the United States District Court for the District of Columbia.

JOINT APPENDIX.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS.

638 Filed Nov 7 – 1950

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil File No. 4915-'50

COMPLAINT

Plaintiff demands a Jury Trial

THOMAS M. BROOKS, 2302-A Park Avenue, Richmond, Virginia, *Plaintiff*

v.

THE RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a body corporate, 735 – 15th Street, N. W., Washington, D. C.

Complaint for Personal Injury to Employee of Railroad

The Plaintiff for his complaint alleges:

FIRST: The defendant is a railroad corporation, organized and existing under and by virtue of the laws of the State of Virginia, and is doing business within the jurisdiction of this Court as an interstate common carrier.

SECOND: This action arises under the Acts of Congress of April 22, 1908, 35 Stat. 65 Chap. 149, with amendments thereto commonly known as the Federal Employers' Liability Act (45 U. S. C. A. Secs. 51-60) and the Act of Congress of March 2, 1893, 27 Stat. 531 Chap. 196 with amendments thereto commonly known as the Safety Appliance Act (45 U. S. C. A. Secs. 1-16) as hereinafter more fully appears.

THIRD: That on or about the twelfth day of December, 1949 the Plaintiff was employed by the defendant as a flagman and brakeman engaged in interstate commerce at Milford, Virginia.

Fourth: That on said date at about 1:25 P. M. the plaintiff, while in the regular course of his duties, was riding with the conductor, also an employee of the defendant, in the caboose on the rear of a 112 car train at Milford, Virginia; that among other things it was the duty of the plaintiff to look over the train for any unusual condition.

639 Fifth: That while said train was proceeding north at or near Milford, Virginia a "hot box" developed on one of the cars near the middle of the train.

Sixth: That at the time of said accident, the acting assistant road foreman of engines, was operating the Diesel engines which were pulling said train and although he was informed of "fire flying" from about the middle of said train, he failed to bring said train to a stop.

Seventh: That the Plaintiff observed the smoke and fire caused by said "hot box" and immediately notified the Conductor, who was also in the caboose.

Eighth: That Conductor went to the rear platform of the caboose to bring said train to a stop by applying the air, and as he was doing so, said train came to a stop so violently that the Plaintiff, who, even though he braced himself, was thrown against the wall and to the floor of said caboose, resulting in the injuries hereinafter set forth.

Ninth: That said accident was caused by:

(a) The negligent failure of the defendant to maintain said car in such a manner as to prevent a "hot box" and resulting fire.

(b) The negligent failure of the operator of said engines to bring said train to a stop after discovering the dangerous condition as set forth in Paragraph Sixth.

(c) The inefficiency of said brakes, in that when the Conductor attempted to bring said train to a stop by application of the air from the rear of the train, in the usual and customary manner, the said train stopped violently with an unusual severe jerk and jolt, resulting in the injury to the plaintiff.

(d) That in the alternative said accident was caused by the negligence of the Conductor of the defendant, in that he applied said air brakes in a careless and negligent manner.

640 TENTH: That as a result of said accident the plaintiff was seriously, painfully and permanently injured about the head, body and limbs, that he has sustained a permanent injury to his back, which required hospital, medical and surgical treatment for a long period of time.

ELEVENTH: That prior to the accident, the plaintiff was a strong able-bodied man, twenty-nine years of age, earning and capable of earning between $3500.00 and $5000.00 per year as a railroad flagman and brakeman; that by reason of the injuries aforesaid he has suffered great physical and mental pain, it being reasonably certain he will continue to do so in the future, and has been and at present is unable to perform his regular occupation as a railroad flagman and brakeman, or any occupation requiring him to be on his feet to any great extent; that his earning capacity has been greatly impaired.

WHEREFORE the Plaintiff demands judgment against the Defendant in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars and costs.

BERNARD M. SAVAGE
Address: 517 Title Building
Baltimore 2, Maryland

ALFRED L. BENNETT
Address: Denrike Building
Washington, D. C.
Attorneys for Plaintiff.

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644 Filed Nov 22 1950

Answer to Complaint for Personal Injury to Employee of Railroad

1. The defendant admits the allegations of paragraph First of the Complaint.

2. The defendant admits the plaintiff's claim purports to to be predicated upon the provisions of the Federal Employers' Liability Act, as amended, and upon the Safety Appliance Act, as amended, but denies that plaintiff is entitled to recover damages from the defendant under either or both of said statutes.

3, 4, & 5. The defendant admits the allegations of paragraphs Third and Fourth and Fifth of the Complaint.

6. The defendant admits that at the time of the occurrence of which the plaintiff complains the acting assistant road foreman of engines was operating the Diesel engines pulling the train in question, that the said foreman was informed that smoke was appearing from under a car 35 or 40 cars back from the engines and that said foreman did not bring the said train to a stop immediately, but according to the said foreman's observation and judgment, there was no cause or reason to stop the said train immediately.

7. The defendant admits the allegations of paragraph Seventh of the Complaint. 645

8. The defendant admits that the Conductor stopped the train by applying the brakes from the caboose, but the defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph Eighth of the Complaint.

9. The defendant denies each and every allegation of paragraph Ninth of the Complaint.

10 & 11. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allega-

tions of paragraphs Tenth and Eleventh of the Complaint.

12. The defendant denies that the plaintiff is entitled to any judgment against the defendant, denies that it is in any way indebted to the plaintiff in the sum of $150,000.00 or in any sum whatsoever.

SECOND DEFENSE.

Further answering the Complaint, the defendant says that the plaintiff's alleged losses and injuries resulted solely from his own negligence.

THIRD DEFENSE.

Further answering said Complaint, the defendant says that the plaintiff's own negligence contributed to his alleged injuries and losses.

McKENNEY, FLANNERY & CRAIGHILL

By MURRAY PRESTON
901 Hibbs Building,
Washington 5, D. C.
Attorneys for Defendant

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693 Filed Jun 5 1951

Pretrial Proceedings

STATEMENT OF NATURE OF CASE:

The contentions of the parties are concisely but adequately set forth in the complaint and answer.

694 STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

The plaintiff may amend his complaint on page 3, line 3, thereof to add the following phrase: "and a severe and permanent shock to his nervous system."

A standard mortality table may be admitted without formal proof.

Dated June 5, 1951

EDWARD M. CURRAN
Pretrial Justice.

REMARKS of Pretrial Justice for consideration of Trial Justice:

There seems to be little or no need for a formal pretrial of this case.

Attorneys authorized to act:

ALFRED L. BENNETT
BERNARD M. SAVAGE
Plaintiff.

MURRAY PRESTON
Defendant.

* * * * * * * * * *

712 Filed Jun 28 1951

Plaintiff's Prayer For Instructions No. 1

The court instructs the Jury that if they find from the evidence that the accident was proximately caused, in whole or in part, by the failure of the air brakes to function efficiently at the time of the accident, although applied in a normal, usual and customary manner by the conductor from the caboose, by use of the conductor's valve, that if they so find, then said failure fastens liability on the Defendant, irrespective of whether the Defendant was negligent or not.

Granted.

PINE, J

* * * * * * * * * *

713 **Plaintiff's Prayer For Instructions** **No. 2**

The Jury are instructed that if they find the inefficiency of said brake system contributed in whole or in part to the happening of the accident, then the verdict of the Jury must be for the Plaintiff.

Withdrawn.

PINE, J

* * * * * * * * * *

714 **Plaintiff's Prayer For Instructions** . **No. 3**

The Court instructs the Jury that if they find from the evidence hot boxes do not occur in the usual and customary course of train movement and if they further find that the existence of said hot box contributed, in whole or in part, to the happening of the accident, then the verdict of the Jury must be for the plaintiff.

Denied.

PINE, J

* * * * * * * * * *

715 Filed June 28 1951

Plaintiff's Prayer For Instructions **No. 4**

The Court instructs the Jury that if they find the Acting Road Foreman of Engines who was operating the engine on the day of the accident was negligent in failing to stop after discovery of smoke coming from the middle of the train caused by a hot box or sticking brakes and if they further find that said negligence, in whole or in part, proximately caused the happening of the accident, then said verdict must be for the Plaintiff.

Granted.

PINE, J

* * * * * * * * * *

716 Filed Jun 28 1951

Plaintiff's Prayer For Instructions **No. 5**

The Court instructs the Jury that if they find for the Plaintiff in assessing the damages, they may consider his present health and physical condition as compared with his health and physical condition prior to the accident and how far his condition subsequent to the accident of December 12, 1949, disabled him from performing his regular occupation or doing any work and whether said injuries are in their nature permanent and how far they are likely to disable him from engaging in his regular occupation or any occupation in the future; and the Jury may also consider his pain and suffering both past, present and future, as well as his actual financial loss to date in addition to his financial loss in the future, and allow him such sum as in the judgment of said Jury will adequately compensate him for the injuries and losses sustained.

Granted.

PINE, J

* * * * * * * * * *

717 Filed Jun 28 1951

Verdict and Judgment

This cause having come on for hearing on the 21st day of June, 1951, before the Court and a jury of good and lawful persons of this district, to wit:

Elmer P. Campbell
Robert K. Moncure
Gilbert F. Carey
Eula G. Davis
Irma L. Fleming
Leo A. Forgette
Eleanore F. Voss
Loretta A. Bridge
Frances J. Furman
Edith E. Woodruff
Hughie Coleman
Richard W. Bywaters

Alternate (not participating in Verdict) Nora M. Heim who, after having been duly sworn to well and truly try the issues between Thomas M. Brooks, plaintiff and the Richmond, Fredericksburg & Potomac Railroad Co., defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 28th day of June, 1951, that they find the issues aforesaid in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is the sum of Seventy-five thousand and no/100 Dollars ($75,000.00).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of Seventy-five thousand and no/100 Dollars ($75,000.00) together with costs.

HARRY M. HULL, *Clerk,*
By WM. YATES, *Depty Clerk.*

By direction of
JUDGE DAVID A. PINE

* * * * * * * * * *

718 Filed Jul 6 1951

Motion for Judgment Notwithstanding the Verdict or for New Trial

Defendant, RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, moves that this Honorable Court set aside the verdict of the jury and the judgment thereon entered in this cause on June 28, 1951, and order a new trial or, in the alternative, enter judgment in this cause for the defendant for the reasons set forth in the attached points and authorities which are prayed to be read as a part hereof.

MCKENNEY, FLANNERY & CRAIGHILL

By MURRAY PRESTON,
901 Hibbs Building,
Washington 5, D. C.,
Attorneys for Defendant.

* * * * * * * * * *

760 Filed Jul 27 1951

Order

Upon consideration of defendant's motion for judgment notwithstanding the verdict or for new trial, and upon consideration of the plaintiff's opposition thereto, and upon further consideration of the oral hearing had upon said motion, it is by the Court this 27th day of July, 1951,

ORDERED, That the motion for judgment notwithstanding the verdict be and it hereby is denied;

AND IT IS FURTHER ORDERED, That if within ten (10) days from this date plaintiff shall file a remittitur of that part of the verdict and judgment in excess of Fifty Thousand Dollars ($50,000), the motion for a new trial will be denied as of the date of the filing of said remittitur, otherwise said motion will be granted.

DAVID A. PINE
Judge

* * * * * * * * * *

761 Filed Aug 6 1951

Remittitur

Comes now the Plaintiff, Thomas M. Brooks, by his Attorneys, Bernard M. Savage and Alfred L. Bennett, and pursuant to the Order of this Court, dated **July 27, 1951,** does hereby remit the sum of Twenty-Five Thousand ($25,000.00) Dollars of the verdict in the above entitled cause.

Dated: August 2nd, 1951.

BERNARD M. SAVAGE
Address: 517 Title Building
Baltimore 2, Maryland

ALFRED L. BENNETT
Address: 507 Denrike Building
Washington 5, D. C.
Attorneys for Plaintiff.

* * * * * * * * * *

Filed Aug 24 1951

Notice of Appeal

Notice is hereby given this 24th day of August, 1951, that the defendant, RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 28th day of June, 1951, in favor of the plaintiff, Thomas M. Brooks, against said defendant, as supplemented by the order of this Court dated July 27, 1951, and the remittitur filed by the plaintiff August 6, 1951.

McKENNEY, FLANNERY & CRAIGHILL
By MURRAY PRESTON
Attorney for Defendant

* * * * * * * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

3 PROCEEDINGS

The Clerk: The case of Thomas M. Brooks v. The Richmond, Fredericksburg and Potomac Railroad Company, Civil 4915-50.

The Court: Will counsel come to the bench?

(Thereupon counsel approached the bench and the following proceedings were had:)

The Court: I have just looked at the declaration, the complaint. I notice you are relying on the Federal Employers Liability Act and the Safety Appliance Act, and what section of that Act?

Mr. Savage: Section 1 primarily.

The Court: What does that relate to?

Mr. Savage: To air brakes.

Mr. Bennett: If the Court please, I would like to present Mr. Savage of the Maryland Bar who is associated with me as attorney for the plaintiff.

The Court: I am glad to know you.

But this section says "not equipped with a power driving wheel brake."

Mr. Savage: It was equipped but it did not operate efficiently.

The Court: Does that come within the statute, as construed?

Mr. Savage: Yes.

The Court: Do you agree with that?

4 Mr. Preston: Not wholeheartedly, if the Court please. I think there is a difference between the requirements of this section and the requirements under the hand brake section where the statute itself actually says it shall be equipped with an efficient hand brake but, for all intents and purposes, we admit that the brakes with which the train is equipped must be in good and proper working order in order to satisfy the requirements of the statute.

The Court: So the provision which makes it unlawful to operate a locomotive in interstate commerce not equipped with a power driving wheel brake has been construed to mean to have an efficiently operated power brake, is that correct?

Mr. Savage: That is my understanding.

Mr. Preston: And, of course, the meaning of the word "efficient" and the cases have gone into that question, the meaning of the word "efficient"—

The Court: What does it mean, one that operates as most of them operate?

Mr. Savage: Not quite. Efficient means a brake which, when operated in the usual and customary manner responds in the usual and customary way.

The Court: That is saying what I thought I said very much better than I said it.

Mr. Savage: I am using the language of the Supreme Court.

5 Mr. Preston: If I may add one proviso, "under the given circumstances of the operation of the train at that time." In other words, it is our contention here that there is no question but what there was a certain rough stop in which this man was hurt but that under the circumstances of this particular case, the rough stop was to be expected by anyone who had any knowledge of the operation of trains and that the roughness of the stop was not due to the inefficiency of the brake or any improper functiong of the brakes, as such.

The Court: Refresh my recollection on this, Mr. Preston—I don't think I have had a safety appliance case since the last one you tried before me—but didn't we find in that case that negligence was not an element, so far as violation of the Safety Appliance Act is concerned and the obligation is absolute?

Mr. Preston: Obligation is absolute to provide the equipment which is required by the Act.

The Court: It is not necessary to find negligence, as such.

Mr. Preston: Exactly.

The Court: But so far as the Federal Employers Liability Act, of course it is.

Mr. Preston: Exactly.

The Court: Does the doctrine of comparable neg-
6 ligence which is applicable to the Employers Liabil-
ity Act apply to the Safety Appliance Act?

Mr. Preston: Will you repeat that question, please?

The Court: Does the doctrine of comparative negligence, which is applicable to the Federal Employers Liability Act, apply to the Safety Appliance Act?

Mr. Preston: I believe it does.

The Court: Do you agree?

Mr. Savage: There is no question about that. It is a hundred percent certain it does not apply to the Safety Appliance Act although it might under certain circumstances apply to Section 51. It never does apply to Sections 1 to 23 which is the Safety Appliance Act. It does apply to Section 51 which is the Federal Employers Liability Act.

The Court: If you should be right in your premise then, do I understand contributory negligence would be no defense?

Mr. Savage: Correct, not admissible.

The Court: But it would be a defense under the Federal Employers Liability Act so far as apportioning damage?

Mr. Savage: Correct; but if the application of the Safety Appliance Act had anything to do with this accident or if it caused or contributed in whole or in part to the happening of the accident, then contributory negligence would not be admissible as to anything because the decisions and the
statutes specifically say, in whole or in part, so that
7 if the Safety Appliance Act does play a part in this
case, if we prove that then the contributory negli-
gence would not be admissible to anything.

The Court: That is your theory?

Mr. Savage: Yes.

The Court: Do you agree?

Mr. Preston: Not in whole and I believe we have special circumstances here in which the applicability of the Federal Safety Appliance Act is so questionable and the circumstances, as I think the evidence will point out, will indicate the weight of the evidence is such that the question of comparative negligence in the diminution of damages should be argued before the law of the case is given to the jury.

The Court: The only difference, as I see it, between you two is the difference of opinion as to the premise, not as to the law. You believe the evidence won't support submission to the jury of the case under the Safety Appliance Act.

Mr. Preston: That is correct, Your Honor.

The Court: And, therefore, being relegated to the Federal Employers Liability Act comparative negligence would be applicable?

Mr. Preston: I believe that is correct.

The Court: I wanted to get your theories before we started on the case.

8 Mr. Savage: I think that is a good idea.

Off the record.

(Discussion off the record.)

(Thereupon counsel resumed their places at the trial table and the following proceedings were had:)

(Thereupon, the panel was examined on voir dire and sworn as follows:

1. Elmer P. Campbell,
2. Robert K. Moncure,
3. Gilbert F. Carey,
4. Eula G. Davis,
5. Irma L. Fleming,
6. Leo A. Forgette,
7. Eleanore F. Voss,
8. Loretta A. Bridge,
9. Francis J. Furman,
10. Edith E. Woodruff,
11. Hughie Coleman,
12. Richard W. Bywaters.

Alternate Juror: Nora M. Heim.)

(Thereupon, Mr. Savage opened on behalf of the plaintiff.)

(Thereupon, Mr. Preston opened on behalf of the defendant.)

The Court: We will take a five-minute recess at this time.

(A short recess.)

Mr. Savage: Mr. Brooks.

Thereupon, **Thomas M. Brooks**, the plaintiff, called as a witness in his own behalf, being first duly sworn,
9 was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Mr. Brooks, will you kindly talk loud enough for all the ladies and gentlemen of the jury to hear you and talk distinctly. What is your full name, your age and address? A. Thomas M. Brooks, 30 years old; 2302 (a) Park Avenue, Richmond, Virginia.

Q. At the time of this accident on December 12, 1949, you were employed by the R. F. & P. Railroad as a flagman-brakeman and at the time of the accident you were at Milford, Virginia, is that correct? A. Yes, sir.

Q. How long had you been employed by the R. F. & P. at that time? A. A little over nine years, sir, from December 1, 1940.

Q. Will you describe your experience? A. I first entered the employ of the Richmond, Fredericksburg & Potomac Railroad as a brakeman; later promoted to flagman and later promoted to conductor.

Q. When you say you were promoted to conductor, that means you were qualified as a conductor, not that you worked all the time as a conductor, is that correct?
10 A. Yes, sir.

Q. What are the duties of a brakeman and a flagman in freight service? You were in freight service, weren't you? A. Yes, sir.

Q. What are their duties, roughly, so the jury will understand what that involves? A. A brakeman does the switching on the railroad, the coupling and uncoupling of cars, checking cars off—

The Court: Speak a little more slowly and when you use expressions that you use in the railroad, explain what you mean.

The Witness: All right. A brakeman's duty is to ride a train and, in the event a car has to be set off or in the event a car is taken off and put on the siding, that is his job; and he switches. It is the flagman's duty to protect the rear of the train, make minor repairs such as cutting out cars or cutting out a car where the brake is not operating. A flagman's duty is to see there is proper equipment on the caboose car, markers on the rear of the train when you pass crossings; that they have fusees, such as a flare which we call a fusee for emergency light; to maintain and keep lanterns in good order for immediate use at any time; to assist the conductor in anything he may see fit to ask
you, such as clerical work, keeping delay orders on
11 the train. That is about all.

By Mr. Savage:

Q. Generally speaking, it is physical work? A. Yes.

Q. It is not a clerical job? A. Yes, sir.

Q. You went to work for the R. F. & P. when? A. December 1, 1940.

Q. And you remained with them continuously as a brakeman for how long? A. Up until I was injured, December 12, 1940.

Q. Were you with them continuously during that period? A. Sir?

Q. Were you with them continuously during that period? A. With the exception when I was in military service.

Q. When were you in military service? A. From May 3, 1944, until October 13, 1945.

Q. In what branch of the service were you in? A. Army Service Forces; Army Transportation Corps.

Q. That is similar to the work you did on the railroad? A. Yes, it was a railroad, sir.

Q. And you handled cars and trains for the Army? A. Yes, sir, supervised movement of trains and handled trains over in Persia.

Q. Persia? A. Yes, sir.

12 Q. Mr. Brooks, at the time of this accident, you were in the caboose of a 112 car train, is that correct? A. Yes, sir.

Q. That was a train consisting of freight cars? A. Yes, sir.

Q. And that was on its way from Richmond to Potomac Yards? A. Yes, sir.

Q. The Potomac Yards is Alexandria, Virginia? A. Yes, sir.

Q. And the motive power consisted of a Diesel engine? A. A Diesel, four units.

Q. That is a large Diesel—

Mr. Preston: I object to the question, if the Court please, on direct examination—

Mr. Savage: You are perfectly right, Mr. Preston. I thought we could save time on things not in dispute by asking leading questions.

By Mr. Savage:

Q. How long was the train? A. 112 cars.

Q. What was on the rear? A. A caboose car, sir.

Q. Were you in the caboose? A. Yes.

13 Q. With whom? A. Conductor Cunningham.

Q. Do you know who was operating the engine? A. No, sir. I was on the rear. I didn't go to the engine.

Q. It is admitted that Mr. Reid, the assistant road foreman of engines was operating the engine. A. Yes, sir, I was told later.

Q. And Mr. Cunningham was the conductor and he was in charge of the train and he was in the caboose with you? A. Yes, sir.

Q. Will you describe, briefly, the air braking system on a train, a train of freight cars? A. Would you mind repeating that question, sir?

Q. Will you describe, briefly, the air braking system of freight cars, a train of freight cars? A. Well, the air is operated from the engine, sir. The engineman has control over the pump to pump the air back to the train.

Q. You are going too fast. You are going over things that you are thoroughly familiar with and you understand what names mean but some of us don't. A. A series of cars hooked together with an engine coupled is considered
a train. On that locomotive, you have pumps that
14 pump air back to those cars and that air is controlled
by the engineman on the head end. He has a service
application up there where he can reduce the air pressure and, in that way, he can put his brake down.

There is a valve on the rear in the caboose car, known as the conductor valve, that you can stop a train on the rear but it doesn't have the notches like an engineer has on the engine. In other words, you can't specify how many pounds that you would like to put down. In other words, crack the valve slowly and slowly let the air in and, in that way, you can get a nice application on the rear.

Q. To summarize, briefly—with your permission—you have air that is pumped from the engine to all the cars. This air operates the brakes and the engineer has a valve to control the operation of that air and, in addition, there is what is known as a conductor's valve in the caboose on the rear which can be used— A. Yes, sir.

Q. By the conductor to stop the train, is that correct? A. Yes, sir.

Q. Is it your duty, together with other members of the crew, to observe conditions of the train at all times? A. Yes, sir.

Q. Particularly when passing around a curve? A.
15 A. Yes, sir.

Q. Why around a curve? A. Well, it is impossible to see a train from the engine back to the caboose car on a straight piece of track as good as you can on a curve. A train going around a curve, you would have a good view of it and more so than you would on a straight piece of track.

Q. As you got to Covington, Virginia, with this 112-car train, approximately how fast were you moving? A. Not Covington; Milford, Virginia, sir.

Q. Milford. How fast were you moving? A. Approximately 50 to 55 miles per hour.

Q. Tell us what happened. A. Well, I was riding in the caboose car in the cupola on the west side and Conductor Cunningham was riding on the east side. A cupola is what you people may think of as a lookout point for observing trains for any unusual conditions, such as doors swinging open, brake riggings hanging down, hot boxes or any other condition you might think might cause personal injury or damage to your equipment.

As the train approached Penola, Virginia, I was riding on the west side of the cupola and I observed the train very closely as I had done on other curves prior to this one. I saw smoke and fire flying from approximately middleways of the train.

16 I immediately notified Conductor Cunningham, who was riding in the caboose car with me on the opposite side of the cupola. Conductor Cunningham immediately got down and went back to the rear platform to apply the air on the conductor's valve on the rear.

As I started to get down from the cupola to the floor level, I noticed the gauge dropping which was a sign that the engineer was making a reduction in his brakes. I called this matter to Conductor Cunningham's attention right away. After I told him that, why he stopped as he was starting to pull the air as he felt that the engine crew had seen what we had seen.

The engineman made a reduction of about 20 pounds and the train started to slow down to approximately 20 to 25 miles per hour. After this the engineman released his brakes and started to increase his speed.

Conductor Cunningham and I both realized they were not going to stop, as we thought they were, so he immediately went to the rear and cracked the conductor's valve on the rear slowly letting the air out. I was standing in the middle of the caboose car with a secure grip around the grab irons in the event the stop was rough and I would have a good support. I watched Conductor Cunningham from where I was standing for the door was open and
glanced at the air gauge every once in a while.

17 Conductor Cunningham kept gradually opening
the valve but all of a sudden came a rough and violent stop which knocked me loose from the grab irons and threw me to the floor of the caboose car.

The next thing I could recall was Conductor Cunningham calling me and asking me whether I was hurt or not. At this time, I was unable to tell him anything as I was numb and somewhat dazed.

I finally managed to get up to my feet and took my flag and went back to protect my train. On the way back, I stopped at the phone box and called the train dispatcher and told him we were standing at Milford, Virginia, and that we either had a hot box or a brake sticking. He informed me to advise him as to when we were ready to leave Milford and I told him I would. I went back to protect my train.

About 1:50 or 1:45 or 1:50, approximate time, Conductor Cunningham started back towards the rear of the train and the engineman called me in by flagging. On my way back, I notified the train dispatcher from all indications they had set the car out with the hot box and to have F. B. Tower, Fredericksburg, to be on the lookout for a message in regard to trouble and cause of delay.

I came back to the caboose and I was suffering severely with pains in the lower portion of my back and down both
legs. I got back up in the cupola after having some
18 difficulty trying to get in there and rode with the
train to Potomac Yards. During the time from Milford to Potomac Yards, I suffered very severe pains and,

on arrival, Conductor Cunningham advised the trainmaster's office who, in turn, sent me to the Alexandria Hospital at Alexandria, Virginia. Mr. J. W. Florence, who was brakeman on the head end went with me to the hospital.

On arrival at the hospital, Dr. A. J. Marott, who is a company doctor, looked me over and advised me that he was unable to diagnose my case unless he took X-ray pictures and owing to the fact that I was a Richmond resident, that he could strap me up and let me go to Richmond where they could X-ray me there where I would be at home in the event I had to go to the hospital. Dr. Marott strapped me up.

I boarded a passenger train and went back to Richmond. On arrival at Richmond, I notified Mr. Stanley, who is desk director at the Broad Street Station, Richmond, of what Dr. Marott had told me. He informed me to go to the Medical College of Virginia in Richmond to the emergency room and the doctors there would take care of me.

I went to the Medical College and, on arrival, the doctors X-rayed me and, after a considerable length of time they informed me—

Mr. Preston: I object, if the Court please.

The Court: Sustained.

Mr. Preston: That is heresay.

19 The Court: You can't state what the doctors told you.

The Witness: All right, sir.

The Court: But as a result of something they told you, did you do something?

The Witness: Yes. The intern at the hospital informed Dr. Benjamin W. Rawles, Jr.—

The Court: I sustain the objection. State what you did or what treatment was given to you after that but you cannot state what these doctors said.

The Witness: I am speaking of the company doctor.

The Court: Even so, you can't state what these doctors informed you.

The Witness: I am telling you that this intern referred me to the other doctor.

The Court: You were referred by the intern?

The Witness: Referred by the intern to Dr. Benjamin W. Rawles, company surgeon, who informed me to visit his office the next morning at 11 a. m. which I did. Dr. Rawles informed me—

The Court: You can't state—

Mr. Preston: I object, if the Court please, again. I am sorry.

The Court: You can't state what the doctor told you.

The Witness: I am very sorry.

The Court: State what they did to you.

20 The Witness: Dr. Rawles advised me—I mean treatment is what I am speaking of, sir.

The Court: Why don't you lead him along now, Mr. Savage.

Mr. Savage: I will be glad to.

By Mr. Savage:

Q. You saw Dr. Rawles? A. Yes, sir.

Q. And, as the result of what he told you, you did what? A. He told me to go home.

Q. As the result of what he told you, you did what?

The Court: Did you go home?

The Witness: Yes, sir, went home.

By Mr. Savage:

Q. What did you do at home? A. Got into bed.

Q. How long did you remain in bed? A. I remained there until the 15th of December.

Q. From when until the 15th? A. From the 13th.

Q. From what? A. From the 13th day of December until the 15th day of December.

21 Q. For two days. Then what happened? A. Then I went to the Retreat for the Sick Hospital.

Q. Why? A. Dr. Rawles sent me there for treatment.

Q. Yes, and what did they do? A. Put me in a bed there with a board in it—

Q. With a what? A. With a board under the mattress.

Q. You remained there how long? A. Until the
22 21st day of December.

Q. Did it help you? A. No, sir.

Q. And then what happened? A. Dr. Rawles informed me to go home.

Q. All right. There is no objection to that, I suppose, to go home. He is not giving you any diagnosis.

As the result of what Dr. Rawles told you, you went home? A. Yes, sir, that is right.

Q. After you got home, what happened? What did you do? A. I still continued to suffer.

Q. Where? A. In the lower portion of my back and both legs.

Q. When you say the lower portion of your back, where do you mean? A. Well, sir, from my waistline down.

Q. And that pain went down into both legs? A. Yes, sir.

Q. All right. Now, go on from there without telling us what anybody told you. You can tell us what you did as the result of what they told you but you can't say what they
did tell you. A. After staying home until January
23 4, the pain was still persistent and Dr. Rawles informed me to return to the Retreat for the Sick Hospital.

Q. And you did? A. Yes, sir.

Q. The Retreat for the Sick Hospital is in Richmond, Virginia? A. Yes, sir, at 2600 Grove Avenue.

Q. And when you got to the Retreat for the Sick Hospital, what did they do? A. Put me to bed, sir.

Q. Go on and tell what happened from then on. A. I laid in the bed until the 14th of January, 1950, and then Dr. Rawles had Dr. J. B. Dalton and Dr. William M. Deyerle and Dr. V. J. May, who are associates of Dr. Dalton and Dr. Charles E. Troland to examine me.

Q. And as the result of that examination, they did what? A. Operated, sir, on January 28, 1950.

Q. At the Retreat for the Sick Hospital? A. Yes, sir.

Q. And where did they operate? A. On the lower portion of my back, from my waistline down.

Q. What did they do, if you know? A. From what I am told, a fusion of the spine.

24 Q. And from the time you left your room until you got back from the operating room, that was how long, if you know? A. I went up about 10:30, sir, and the next thing I can remember was about 6 o'clock that night.

Q. You were given ether, were you? A. Ether and gas, yes, sir, is what I was told.

Q. After you got back in your room what happened and you regained consciousness? A. Well, I suffered a great deal and was out of my head and they had to give me hypodermics for a long period of time and, after three weeks from the date of the operation, a body cast was applied.

Q. Before your operation, did they have to give you any hypodermics to ease the pain? A. Yes, sir, every few hours.

Q. That was almost continuous from the date of your injury to the date of your operation? A. Yes, sir.

Q. And then for three weeks after the operation you had hypodermics? A. I wouldn't know exactly how long it was, sir.

Q. Approximately. A. Approximately, I would say, yes, sir.

Q. And three weeks later they applied—A. A body cast.

Q. A plaster of paris body cast? A. Yes, sir.

25 Q. Which extended from where to where? A. From underneath my shoulders down to my legs.

Q. Which you kept on for how long? A. Up until approximately May 28.

Q. From when to when? A. February 18 to approximately May 28.

Q. And when that cast was removed, what was done? A. A steel brace was fitted for my back.

Q. Who fitted that or who prescribed it? A. Dr. William Deyerle.

Q. Who performed this surgery? A. Dr. Deyerle and Dr. Troland.

Q. Dr. Deyerle is an orthopedic or bone surgeon? A. Yes, sir, that is what I am told, sir.

Q. And Dr. Troland is a neurosurgeon—

Mr. Preston: He will so testify tomorrow.

By Mr. Savage:

Q. That has to do with bones and nerves and nerve surgery. This steel brace you wore from when to when? A. From May 28, from the date they took the cast off, sir, I will say, up until approximately November of 1950.

Q. And from November of 1950, have you worn anything?

A. Yes, sir, I have worn that brace off and on and I
26 have a back support that I am wearing right now,
sir.

Q. You mean you alternate between the brace and the back support? A. Yes, sir.

Q. You don't wear them continuously? A. No, sir.

Q. And when do you wear the back support? A. Well, if I am going anywhere where I sit for any length of time or stand any reasonable length of time or walk any distance, I feel it does give me support but little support. I still have the pain, so much pain I can hardly walk. I wore it up here for I felt being up here the next two or three days, there would be a lot of pressure sitting in the same position where I couldn't get up and walk around so I felt it would be of benefit to me.

Q. You are wearing the support now? A. Yes, sir.

Q. Tell us about the pain that you just mentioned. Describe it to us. A. Well, the pain starts about my waistline and goes all the way down to the tip end of my spine and down both legs.

I have a drawing sensation in both my left and my right legs, more in my right leg. I have numbness in my heel and
a pulling sensation all the way up to my back or
27 waistline.

This pain is so severe I can't walk more than two blocks at once and I can't sit in one position long or stand in one position too long. In other words, if I walk too long, I have to sit down and if I sit down too long, I have to stand up to get a little ease. If I am laying down, I waken up probably two hours after I go to bed and sit on the side of the bed and I can get relief by doing that and then lay back down. By changing from one position to the other, that seems to help me some.

Q. When you say you can't walk over two blocks, you mean you can't walk over two blocks without pain? A. Yes, that is right. I can walk two blocks but I can't walk more than two blocks without having severe pain.

Q. You mean you can walk more than two blocks, however? A. Yes, sir.

Q. Have you been able to work at all since this accident occurred? A. No, sir. I have tried to do little jobs around the house and every time I attempt to do anything just light, I just ache and pain so bad I have to go and lay down in the bed.

Q. Have you made any attempt to do anything except work around the house? A. Yes, sir. I applied for several jobs and very unfortunately they turned me down
28 and said a man in my condition wouldn't be any use to them.

Q. You are able to drive a car? A. Yes, sir, but not any long distance. I might say around town or go to the grocery store, something of that sort. One reason I don't drive one is because I don't have one.

Q. I believe you said you live in Richmond, Virginia? A. Yes, sir.

Q. You have lived there for how long? A. All my life, sir, with the exception of nine months.

Q. And you were with the railroad some ten years. I believe you were 19 when you went to them? A. Nineteen years old, yes, sir.

Q. Do you have any other trade or occupation outside of railroading? A. No, sir.

Q. Mr. Brooks, was your back ever injured before? A. Yes, sir. I had a disc removed from my spine on June 17, 1948, from an injury I received while I was on the R. F. & P. Railroad.

The Court: What was that date?

The Witness: June 17, 1948, sir.

By Mr. Savage:

Q. And were you operated on then and by whom? A. Dr. Charles E. Troland.

29 Q. He was the same doctor that participated in this last operation? A. Yes, sir.

Q. You were operated on when? A. On June 17, 1948.

Q. And at that time, you were in the employ of the R. F. & P., the present railroad? A. Yes, sir.

Q. And you went back to work when? A. August 17, 1948.

Q. Two months later? A. Yes, sir, 60 days from the date of the operation.

Q. What was the condition of your back when you went back to work? A. Well, it was very good as far as I am concerned, sir.

Q. Did you work with reasonable regularity from August, 1948, until December 12, 1949? A. Yes, sir.

Q. Was your back giving you any trouble? A. No, sir, not at all.

Q. The operation was successful? A. Yes, sir.

Q. You had a good back up until the time of this injury on December 12, 1949? A. Yes, sir.

30 Q. Mr. Preston in his opening statement to the jury said that if smoke or fire is observed to be flying, that the train should be brought to a stop. Is that your understanding of the rules? A. Yes, sir.

Q. You observed the smoke or fire flying approximately midway in the train? A. Yes, sir.

Q. A train of 112 cars is approximately how long? A. I would say around a half a mile or a little over.

Q. It would be a little more than that, wouldn't it? About how long is a car? A. About 40 feet, sir.

Q. So it would be 40 times 112? A. Yes, 40 times 112 would be correct, sir.

Q. Plus the Diesel and your caboose? A. Yes, sir.

Q. In other words, approximately 4700 to 4800 feet? A. Yes, sir.

Q. Mr. Preston mentioned to the jury there is approximately 10 inches of slack in the coupling of each car, is that about right? A. I would think it would be a little bit more; I would say eight inches on each draw head.

31 Q. Then 16 inches for each car? A. Yes, sir, 16 inches on both ends.

Q. So that with a train of 112 cars, you would have several hundred feet of slack? A. Yes, sir, that is right, sir.

The Court: It is now 12:15 and I stated I would recess for lunch at this hour. We will recess until 1:30.

(Thereupon, at 12:15 o'clock p. m. the luncheon recess was taken until 1:30 o'clock p. m.)

32

AFTERNOON SESSION.

(The trial was resumed at 1:30 p. m.)

Mr. Preston: Your Honor, may we approach the bench?

(Thereupon counsel approached the bench and conferred with the Court out of the hearing of the jury, said conference not being reported at the direction of the Court and Counsel, following which counsel resumed their places at the trial table and the following occurred in open court:)

The Court: Resume the stand, Mr. Brooks.

Thereupon, **Thomas M. Brooks,** the plaintiff, having been previously duly sworn, resumed the witness stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Savage:

Q. Mr. Brooks, I believe you said before recess that you had hold of both grab irons in the caboose, is that correct? A. Yes, sir.

Q. What is a grab iron? A. Grab iron leading from the top of the cupola, which is the lookout point.

Q. I can't hear you. A. The grab iron leading from the
top of the cupola down to, approximately, I would
33 say the top of the lockers.

Q. Top of what? A. Lockers where we keep our clothes in, and I would say the length of them are approximately three feet.

Q. It is a round piece of iron, isn't it? A. Yes, sir, that is right.

Q. What does the term grab iron mean? A. Something to hold to, in the event you need something to hold to.

Q. All right. Round pieces of iron to grab hold of? A. Yes, sir.

Q. You were grabbing hold of both of those? A. Yes, in the event we did have a rough stop.

Q. Did you expect a rough stop? A. There is the possibility that the stop will be rough when applying air from the rear.

Q. Since you were braced, and you did get a rough stop, why didn't you hold on? A. The rough was so violent it knocked me loose of the grab irons and threw me to the floor.

Q. You said the rough was so violent. You meant the stop, didn't you? A. Yes, sir.

Q. What do you mean by so violent? A. It was rougher than any other I have ever experienced in my career of railroading.

34 Q. It was what? I can't understand you. A. It
was one of the roughest stops I have ever seen in my
career of railroading.

Q. At the time that stop came, where was the conductor, Cunningham? A. Standing on the rear platform at the conductor's valve, braced against the back of the cab, and his feet up against the steps.

Mr. Savage: You have seen this, Mr. Preston.

By Mr. Savage:

Q. I don't believe you have seen this before, but would any of these cabooses approximate the caboose you were in at the time of the accident? A. Yes, sir, I would say the one at the bottom, the Southern Pacific.

Q. The one at the bottom? A. Yes, sir, somewhat similar.

Mr. Savage: Now, with Your Honor's permission, I will show this to the jury.

Mr. Preston has seen it.

Mr. Preston: May I see that particular one?

Mr. Savage: The one at the bottom is the one, the same thing I showed you before.

Mr. Preston: That this is an approximation?

Mr. Savage: If you have a photograph.

35 The Court: Do you want to offer it in evidence?

Mr. Preston: I don't offer it in evidence.

The Court: You don't object?

Mr. Preston: I don't object.

(The photograph referred to was marked Plaintiff's Exhibit No. 1 and received in evidence.)

The Court: You may walk slowly across.

Mr. Savage: Ladies and gentlemen of the jury, the one he has identified as being approximately like the one he was in is this one at the bottom.

The Court: Will you walk slowly, so they can all see it?

(The exhibit was shown to the jury.)

By Mr. Savage:

Q. What is the cupola you described before? Where is that? A. It is the dormer section, looks like a dormer window.

Q. Dome window? A. Dormer window, something similar to an extra story to the caboose car.

Q. At the time of the accident you were on the inside of this caboose? A. Yes, sir—not inside of that one, but something similar to that.

36 Q. And the conductor was where? A. On the rear platform, standing just where this platform is here (indicating).

Q. Make a mark on it and put a C where the conductor was, and the valve there, the conductor's valve would be here? A. Approximately here.

Q. Put a V there.

The Court: Hold it where he could point to it, and the jury could see.

Mr. Savage: He has made a V here on the end of the car, which would indicate the conductor's valve, which is on the end of the car, and the conductor was on this rear platform. The V is right here, the valve, and the conductor was right here.

By Mr. Savage:

Q. About how much space was there between the end of the car and the railing on the rear of the car? A. I would say approximately 20 to 24 inches.

Q. So that the conductor was in a space of 20 to 24 inches? A. Yes, sir.

Q. Was the door open? A. Yes, sir.

Q. Could you see what he was doing? A. Yes, sir.

37 Q. What was he doing? A. He was standing with his back against the cab, his foot up at the—

Q. His back against the cab? A. Yes, sir.

Q. You mean his back against the rear wall of the caboose? A. Rear wall of the caboose, correct.

Q. Go on. A. With his foot on the ladder that led from the platform up on the top of the cab, in the event you want to get on top, bracing himself.

Q. What was he doing? A. With his hand on the valve, his right hand on the conductor's valve.

Q. And he was doing what? A. Slowly opening the valve and letting the air out.

Q. Slowly opening the valve and letting the air out? A. Or cracking the valve, as we speak of it, sir.

The Court: What?

The Witness: Cracking the valve, just cracking the valve open.

By Mr. Savage:

38 Q. When you say cracking the valve, you mean opening it very slowly, is that correct? A. Very slowly, yes, sir.

Q. And that is the conductor's valve on the rear of the cab that we have talked about? A. Yes, sir.

Q. And the purpose of cracking the air or opening it slowly in that valve is to do what? A. To discharge the air from the train line as slowly as possible, in order to get the desired brake application.

Q. In order to get a desirable brake application? A. Yes, sir.

Q. And that desirable brake application is known as what kind of application? A. A service application.

Q. Did he get a service application? A. Well, first he cracked the valve. I could hear the air from where I was standing.

Q. Talk a little more slowly.

You could hear the air from where you were standing? A. Yes, sir.

Q. Did he get a service application of the brakes?

Mr. Preston: I object to that question until we determine whether or not Mr. Brooks is qualified to give an opinion on that particular matter. That, I think, is a highly technical question.

39 The Court: I think he is right about that. He can state what kind of a result occurred after he cracked the air.

By Mr. Savage:

Q. What result did Mr. Cunningham get as he was reducing or cracking the air on the valve? A. Well, the air just started to discharge, and dropped very slowly. Then, when he opened it a little bit more, then the air went down, of course, farther. Then, when he opened the valve almost wide open, then came the crash.

Q. Came the crash? A. Yes sir.

Q. By the crash you mean what? A. I mean the rough stop sir.

Q. I believe you have testified you had approximately ten years' railroading experience? A. Yes, sir, approximately.

Q. Was he releasing the air from this valve in the usual and customary manner? A. Yes, sir.

Q. In order to get a normal brake application? A. Yes, sir.

Q. But I believe it is your testimony that instead of getting a normal brake application he got what kind of stop?

A. An emergency stop.

40 Mr. Preston: I object to that answer, if Your Honor please, on the same ground I objected to the other question.

The Court: An emergency stop is a word of art, isn't it?

Mr. Preston: Exactly, if the Court please.

The Court: I sustain the objection until he is qualified to express his opinion as to whether it was an emergency stop, in railroad terminology.

By Mr. Savage:

Q. Not using the word "emergency" I believe you said he got the roughest kind of stop you have ever experienced in your railroad experience? A. Yes, sir.

Q. The purpose of cracking the valve, as you have explained it, instead of opening it wide all at once, is what? A. In the event you opened the valve wide open, you are bound to get an emergency application, for the simple reason you are discharging all your air at one time, whereas, if you cracked your valve, you get a slow—

Mr. Preston: I object, if the Court please.

The Court: Yes. If he is going to give this testimony, he ought to be qualified. I don't know whether he has ever operated any valve or seen it operated, or knows anything about it. He has been a flagman.

41 Mr. Savage: The last question was what?

(The pending question was read by the reporter.)

By Mr. Savage:

Q. Leaving out the word "emergency," simply describe it with reference to the kind of stop you get. Don't use the term "emergency," or any technical term. Describe it as between easy stop, rough stop, or use any other term you desire. A. Very undesirable stop.

Mr. Preston: May I have that word again?

The Witness: Very undesirable stop.

The Court: Undesirable.

Mr. Preston: I object to that.

The Court: I sustain the objection. That doesn't mean anything.

Mr. Preston: It is also in a certain context another word of art, and a very technical word in air brake parlance, if the Court please.

The Court: This witness can testify what he saw the conductor do, and then he can testify what happened, whether it was a smooth, soft stop, or whether it was a rough, violent, unusual stop. I think he has already given testimony on that. Is that what you wanted to bring out?

Mr. Savage: Well, partly, sir.

By Mr. Savage:

42 Q. Have you had any experience operating air brakes? A. Yes, sir.

Q. Describe briefly that experience. A. Well, cutting out cars, coupling air hose, bleeding cars.

The Court: What?

The Witness: Bleeding cars, bleeding the air from cars. Making brake tests on the road where our car inspector is not available, applying the air from the rear.

By Mr. Savage:

Q. As a matter of fact, every time a train is hauled over the lines of a railroad, except in switching operations, the movement of that car is controlled by air brakes, is that true? A. Yes, sir.

Q. Is it also true every member of the crew has to be familiar with the operation of air brakes? A. Yes, sir.

Q. And use it every day? A. How is that, sir?

Q. And use air brakes every day in the operation of the railroad? A.Yes, sir.

Mr. Savage: I am going to lead him a little bit if you have no objection, for there is certainly no dispute
43 about these things.

By Mr. Savage:

Q. You have on every engine compressors, is that correct? A. Yes, sir.

Q. And those compressors pump air into the train line, is that correct? A. Yes, sir.

Q. And the train line is connected with each car by means of a rubber hose, is that correct? A. Yes, sir.

Q. So that air passes from the engine all the way back to the caboose, is that correct? A. Yes, sir.

Q. And that is true whether you have ten cars or a hundred cars, is that correct? A. Yes, sir.

Q. And you have air on both sides, you have an auxiliary reservoir which has a supply of air in it, is that correct?

Q. And on the other side you have a train line which has

A. Yes, sir.

air in it, is that correct? A. Yes, sir.

44 Q. And when the engineer attempts to apply the brakes, he reduces the air pressure on the other side,

to permit the air pressure on the other side to apply the brakes, is that correct? A. Yes, sir.

Q. And the same thing happens on the rear when you reduce the pressure on the train line, is that correct? A. Yes, sir, that is right, sir.

Q. So that by cracking the air on the line as you explained it, you want to get what kind of brake application? Don't use technical terms. A. A service application.

Mr. Savage: Well, I think he has qualified himself.

By Mr. Savage:

Q. What is a service application? A. A service application is a normal, even stop. You wouldn't class it an emergency stop. It is a normal, even stop.

Q. What is an emergency stop? A. An emergency stop is a quick and sudden stop.

Q. What happens to the air when you get an emergency stop? A. The whole train line dumps at one time.

The Court: The whole train line does what?

The Witness: In other words, the train line pressure is exhausted all at one time. 45

By Mr. Savage:

Q. Normally on the R. F. & P., you have a brake pressure of what, air pressure of what? A. 70 pounds.

Q. In order to get a service application, you would reduce the air how much? A. Approximately 18 to 20 pounds.

Q. That is a service application? A. Yes, sir.

Q. Service. And to get an emergency application, what would you do? A. Push the lever all the way over to the last notch, what we call the big hole, dump the whole, entire system at one time.

Q. Instead of having 18 or 20 pounds application on the piston applying the brakes to the wheels you would have a 70-pound pressure? A. That is right, sir.

Q. And you say at this time you got an emergency application? A. Got an emergency stop.

Q. I mean an emergency stop.

And the manner in which he was applying the brake was the usual and customary manner to get a service
46 application? A. Yes, sir.

Q. The engineer had nothing to do with the stopping of this train, after the conductor operated the valve from the caboose, did he? A. No, sir.

Q. It was stopped independent of what the engineer did? A. Yes, sir, that is right.

Q. I believe you previously testified that the engineer reduced the speed of the train, I think from 55 to 25 miles per hour. Is that your testimony? A. Yes, sir.

Q. And then speeded up again. A. Yes, sir.

Q. In your experience is it possible to tell 35 or 40 cars away whether or not you have a hot box or a sticking brake?

Mr. Preston: I object to that question. I think he cannot tell whether it is possible. I think he could say whether he can do it.

The Court: Will you read the question?

(The question was read by the Reporter.)

Mr. Savage: I will withdraw the question.

By Mr. Savage:

Q. Do you know the reason for the rule requiring
47 engineers or trainmen to bring a train to a stop when they have either a hot box or sticking brakes?

Mr. Preston: If the Court please, I don't believe there is any evidence that there is such a rule at this time.

Mr. Savage: You said so in your opening statement.

Mr. Preston: I know.

The Court: I sustain the objection. Lay the foundation.

By Mr. Savage:

Q. Is there such a rule? A. Yes, sir, there is.

Q. Do you know the reason for the rule? A. Yes, sir, because—

The Court: Don't state the reason. Answer the question he asked you.

The Witness: Yes, sir.

By Mr. Savage:

Q. What is the reason? A. Well, very dangerous conditions can arise from a hot box or a brake sticking.

Q. What dangerous conditions? A. In the event of a hot box, a journal can wring off and turn the train over.

Q. A journal can wring off? You may know what that means, but some of us don't.

48 Do you mind me leading the witness on some of these questions?

Mr. Preston: Not too far.

Mr. Savage: We will save a great deal of time, if I can.

By Mr. Savage:

Q. When you say a journal may wring off, a journal, as you have described it, is simply a continuation of the axle, is that right? A. Yes, sir.

Q. The axle is the part that fits in the bearing, is that correct? A. That is right.

Q. How is that axle and bearing lubricated? A. It has waste in there with regular lubricating oil.

Q. Waste, simply cotton waste? A. Cotton waste, that is right.

Q. Some of these mechanics carry it in their pockets to wipe their hands on? A. Yes, sir.

Q. That is put in this box? A. Packed in there.

Q. What do they use to lubricate that? A. Regular lubricating oil.

Q. A lubricating oil goes from the waste around—
49 A. To the bearing.

Q. And does what? A. And lubricates the bearing and journal.

Q. When you say you might get a journal to wring off, what do you mean? A. After the car catches afire, the hot box usually develops, it starts smoking. Afterwards, the heat is so terrific it sets the waste and oil on fire, and after that waste burns out, it is white hot. Naturally, the way the car is resting on that journal and bearing, it just wrings off, or snaps off. When it does, that is a car down.

Q. In other words, to reduce it to language we all understand, it is liable to break an axle, wring an axle off? A. Wring an axle off.

Q. Which would mean the axle would drop down, and might cause what? A. An accident, a derailment.

Q. A derailment? A. Yes, sir.

Q. And I believe you said you realized danger and notified the conductor of that condition? A. Yes, sir.

Q. That was Conductor Cunningham? A. Yes, sir.

Q. You say the condition of your health was good
50 before this accident? A. Yes, sir.

Q. Your back was O.K.? A. Yes, sir.

Q. Was it necessary for you to wear braces before this accident? A. No, sir, I never wore a brace.

Q. I notice you have a peculiar gait and a limp. Did you have that before this second accident? A. No, sir.

Q. You worked on the R. F. & P. about ten years?

The Court: That is repetitious.

Mr. Savage: Yes. I wanted to go into another question.

By Mr. Savage:

Q. When you were discharged from the Army, you were not discharged with any physical discharge, were you? A. No, sir, dependency discharge.

Q. I mean your health was good when you were discharged from the Army? A. Yes, sir.

Q. A railroader builds up certain seniority as his years of service increase. Just what is that? A. Well, from the day you are hired, your seniority takes effect, and in the event anyone is hired behind you, of course that would be a man younger in seniority than yourself.

51 In the event he had a job you preferred, you had a right to pull him. What we mean by pulling, is to pull him out of that job, and take the job yourself.

Q. You mean as your years of service increase? A. That is right.

Q. Your opportunity for employment increase, and you have a choice in the selection of jobs, is that correct? A. That is right, sir.

Q. Superior to the man behind you? A. Yes, sir.

Q. And the longer you work on the railroad, the more seniority you have? A. That is correct, sir.

Q. And the more seniority you have, the more security you have, and the more selection you have, in selecting your jobs? A. That is true.

Q. And when men are laid off from work, they are laid off in the inverse order of their seniority, is that correct? A. Yes, sir.

Q. Your earnings, and this is by agreement—this is an approximation—from December 13, 1949, until May 31, 17½ months, 1951, showed an average monthly earning of $419 up until April 1, 1950, and from April 1, 1950, taking into account the recent increases, $450.
52 That is an approximation. That is correct, isn't it? A. Yes, sir.

The Court: I didn't understand that question. You brought it up to 1951. I thought he hadn't been able to work since the accident.

Mr. Savage: There was a raise or increase which took effect as of a certain time.

The Court: You mean the earnings he would have made?

Mr. Savage: That is correct.

The Court: You didn't say so.

Mr. Savage: I am sorry. I appreciate your correction.

By Mr. Savage:

Q. Now, they were the earnings which you would have made, had you been able to work, is that correct? A. Yes.

sir, that is what I referred to, yes, the last time. Yes, sir.

Mr. Savage: Thank you, very much.

The Court: $419 a month until April, 1950, and then it would have been $450 a month, is that right?

The Witness: Yes, sir. That is what my salary would have been, sir, in the event I had been working.

By Mr. Savage:

53 Q. Actually, you received no income at all up to the present time? A. No, sir, with the exception, I would like to say, I have a small insurance policy. I wouldn't consider that income.

Q. You paid for that yourself? A. Yes, sir. That is right, sir.

Q. Are you able to go back to railroading now? A. In my condition, sir, and being familiar with the type of work you do on the railroad, I don't see how I could do it, sir. My back is stiff.

Q. Your answer is no? A. No is right, sir.

Q. Are hot boxes things which occur constantly, or seldom? A. Well, on the average of about—

Q. Just answer the question. A. How is that? Repeat that again.

Mr. Preston: I couldn't hear his answer.

Mr. Savage: He didn't answer. He said to repeat it.

The Witness: I asked him to repeat the question.

By Mr. Savage:

Q. Are hot boxes things which occur frequently or seldom? A. Very seldom now, sir.

54 Q. Do you know from your experience whether or not if a journal is working properly and lubricated properly a hot box should develop? A. It should not, sir.

Mr. Savage: The witness is with you, Mr. Preston.

Cross Examination

By Mr. Preston:

Q. Mr. Brooks, I believe you testified that after you came down from the cupola, down onto the floor of the caboose, having seen the smoke up forward, that you had hold of grab irons inside the caboose, standing on the floor, and facing to the rear of the train, and were watching out that direction. Was the air valve, the air gauge visible to you at that time? A. Yes, sir.

Q. Did you observe that gauge at about the time when Mr. Cunningham was about to or was operating the air valve? A. Well, off and on, sir.

Q. Did you see what the air pressure was on that gauge at or about that time? A. You mean when Mr. Cunningham made the reduction?

Q. Yes, at or about that time did it come to your attention what the pressure in the train line was at that time? A. Approximately 50 to 55 pound of air.

Q. Now, you have also testified that Conductor Cunningham just first, as you say, cracked the valve, cracked the air, is that correct? A. Yes, sir.

Q. And then some time following that the heavy jolt came? A. Not at first, sir, when he first cracked it.

Q. What I want to know, Mr. Brooks, is what was the time interval in between the cracking of the valve by Conductor Cunningham, and the time when this jolt came. A. Well, I would say a matter of minutes.

Q. A matter of minutes? A. From the time he cracked the valve, I would say a matter of two minutes, about.

Q. About two minutes? A. Yes, sir, from the time he cracked the valve.

Q. All right. Did you notice him moving the valve gradually, or did he move it slowly? Did he move it in little steps, or slowly, or could you observe that? A. I couldn't observe that too closely, but it is customary to move it by steps.

Q. Little steps, is that right? A. That is right.

Q. You think, and as best you can estimate it, that this interval, that the air was exhausted, in other words, in about two minutes? A. Yes, sir.

56 Q. Prior to the jolt striking? A. Yes, sir.

Did you stand motionless for two minutes? A. Well, I was looking up at the gauge, and looking back and forth there.

Q. I can't hear you. You speak very rapidly. A. Would you mind repeating the question?

Q. I say were you standing still, holding the grab irons for two minutes? A. Well, I was looking at the air gauge and then looking back out at Conductor Cunningham during that course of time.

Q. Did you move around inside the caboose at all during that interval? A. No, sir. No, sir.

Q. Stood there in one place? A. No, sir.

Q. Two minutes? A. Yes, sir. I stood right there at one place, yes, sir.

Q. Holding on all the time? A. That is right, sir.

Q. And I believe you testified that you were expecting a certain amount of roughness in the stop? A. Well, yes, sir, I would say some roughness, but I wouldn't say as rough as it was.

57 Q. That is what I say, a certain amount of roughness in the stop. It is more or less normal to expect that when the air is operated from the caboose, isn't that true? A. Not necessarily, no, sir.

Q. But it happens with a fair degree of frequency? A. Well, it is not as smooth, I would say, as if the engineman would stop the train, but you can make a smooth stop with the conductor's valve.

Q. Now, this conductor's valve, will you give me a little more detailed description of what the valve actually is? What does it look like? You have testified you know generally about the train, so I am assuming you can give us a description of the valve itself.

The Court: Perhaps he could draw it on the board. Are you any good at that?

The Witness: Well, I will try, sir. I am not an artist, but I will do my best.

The Court: Step down there.

The Witness: I will make it large, so you can see it.

The Court: Hand him the pointer, Mr. Marshal, please.

The Witness: This is the valve itself. There is supposed to be a little hole there. By pulling this lever forward, or either pushing it away from you, you discharge the air that is in the train system. The train line down there—

58 Mr. Savage: Just a minute. This lady has to write what you are saying. Talk slowly and distinctly. Will you repeat that, please?

The Witness: We will just presume this is the train line down here, probably a two- or three-inch pipe.

This is your branch pipe leading from your main train line, leading up the back railing of the caboose car. There is a pin moved through there, and the air moves up through the whistle, and by turning this lever, pulling it to you, or pushing it away from you, you can discharge air from the line.

This little contraption here that looks like a button can be pressed, and will give you the sound of a whistle. In the event of a reverse movement on a road crossing, you use, in that event, the back-up whistle. It can be heard from the caboose car. The engine is ahead, and they can't blow the whistle. The brakeman or the conductor, whoever is riding the rear, someone is supposed to be riding the rear, will push that whistle.

In stopping the train from the rear, you can pull that lever to you, or push it away from you.

I might add there are no notches on it you can gauge how much air you can release at one time, like you do on the brake valve of a locomotive.

59 By Mr. Preston:

Q. When you open that valve, it just releases air out in the atmosphere from the train line, is that not right? A. Yes, sir.

Q. Then, if you leave that valve open, wouldn't the pressure all finally go out? A. Oh, yes, sir, in due course of time it would.

Q. And then there would be left atmospheric pressure in the train line, is that correct? A. I don't know about that, sir.

Q. Well, if you have pressure in the train line, and open one end of it, it is all going to go out? A. Yes, sir, it will all go out.

Q. Atmospheric pressure is all that is left? A. I couldn't tell you. I haven't examined it that closely. If I could answer it, I would answer for you. I don't know.

Q. You don't know, in other words? If you leave the valve open a sufficient length of time, the air will stop flowing out of that line, will it not? A. Yes, sir. There is none there. It can't come out.

Q. That is right, it will be just an open line, open-ended line? A. Wait a minute. Let me ask you a question, sir. Do you mean, now, if the engine is coupled to it, or
60 a train standing?

Q. I mean with the engine coupled to it. A. You would still get a force of air with the engine coupled to it. Those pumps are going, then. You didn't ask the question clearly. That is why I asked over. In the event of the locomotive, as long as those pumps keep on, the air is going somewhere.

Q. But you have an open line in the caboose, once you open that valve? It doesn't take the air around and put it into some other tank or contraption? A. No, sir, it goes out in the atmosphere.

Q. Right out in the atmosphere? A. That is right.

Q. Do you know if Conductor Cunningham ever closed this valve after he once opened it? A. I don't recall, sir.

Q. Now, I believe you testified that you did have a previous back injury, or an injury previous to the one which occurred in December, 1949? A. Yes, sir. That is right, sir.

Q. Do you know what the operation was that was done on your back as a result of that injury? A. I don't know, sir. What I was told was they removed a disc from the fifth intervertebral disc. I don't know anything about medical terms. I am not a doctor.

61 Q. Who did that, what doctor? A. Charles E. Trolland.

Q. Who referred you to Dr. Trolland? A. Dr. Carl E. Menter.

Q. Was he your personal physician? A. Yes, sir.

Q. Has there been any substantial improvement in your condition since you first got out of the body cast and started walking around? A. What accident are you speaking of?

Q. What, sir? A. What accident are you speaking of, this last accident?

Q. Yes. A. Yes, I can say there was some improvement, but it is so slight you would hardly recognize it.

62 Q. Do you still have pain in both legs? A. Yes, sir, at the present time I do.

Mr. Preston: I believe that completes the cross examination.

Redirect Examination

By Mr. Savage:

Q. Is it more severe in one leg than the other? A. Yes, sir.

Q. I believe your testimony was as long as the air pumps are pumping air, you can't have atmospheric pressure in a train line, is that right? A. Yes, sir, that is right.

Q. If the pumps pump the air in faster than it is being discharged through the conductor's valve, you will have air in there all the time? A. That is right, sir.

Q. In other words, it is similar to a spigot, if you open the spigot faster than it will flow, it will stop, if you just crack it slightly, it will flow out slowly, is that correct? A. That is right, sir.

Q. You say you were referred to Dr. Trolland by your family doctor the first time? A. Yes, sir.

Q. He wasn't also the railroad doctor, was he? A.
63 No, sir, he was not a railroad doctor.

Mr. Savage: That is all.

Mr. Preston: That is all I have.

The Court: Let me ask a few questions.

I am not sure that I understood where you were when you first noticed the smoke emanating from a car midway or thereabout in the train. A. I was riding in the cupola, sir, which is the lookout tower for observing trains.

The Court: Looking out one of those windows?

The Witness: Yes, sir. There is a windshild on them for you to look out.

The Court: You just answer my questions.

The Witness: Yes, sir.

The Court: And as you observed that condition, you were on the right-hand side of the cupola?

The Witness: On the west side. Yes, sir, it would be the right-hand side.

The Court: And the conductor was on the left-hand side?

The Witness: On the east, yes, sir.

The Court: And then I understand you to say you reported that condition to him?

The Witness: Yes, sir.

The Court: Did he do anything then, or did he wait until the train made another turn, so he could see?

64 The Witness: I got down, sir. Whether he looked out, I don't know. He went back to pull the air from the rear.

The Court: He came down the ladder from the cupola?

The Witness: Pair of steps.

The Court: Steps?

The Witness: Yes, sir.

The Court: And went back to the rear of the train, is that correct?

The Witness: Yes, sir.

The Court: And you followed him down the steps?

The Witness: Yes, sir. I started down the cupola steps when I noticed the air gauge.

The Court: When you noticed the air gauge?

The Witness: Yes, sir, that the engineer was making a reduction, and I called the matter to his attention.

The Court: Where was the air gauge?

The Witness: Up in the cupola, center-ways of the cupola, between where I was sitting and the conductor was sitting, east side, west side, right or left, whichever you want to call it.

The Court: The gauge is in the cupola?

The Witness: That is right, sir.

The Court: You noticed the gauge showed a reduction of air?

The Witness: Yes, sir.

65 The Court: And you also observed a decrease in the speed of the train?

The Witness: Yes, sir, as it made a reduction.

The Court: Then you came down the stairs?

The Witness: Yes, sir, and called this matter to Conductor Cunningham's attention.

The Court: And you did not go back again to look at the gauge?

The Witness: From where I was standing at the bottom of the floor, holding onto the grab irons, I could see the gauge.

The Court: You could?

The Witness: It is open between the seats where we sat.

The Court: How big is that gauge?

The Witness: I would say five or six inches in diameter, about that size (indicating).

The Court: And it doesn't face upwards?

The Witness: No, sir, faces just like that clock on the wall does.

The Court: And you can see it from the stairwell?

The Witness: I was standing on the floor when he made the application from the rear.

The Court: And you could see that gauge?

The Witness: Yes, sir.

The Court: So you observed the gauge again when
66 the conductor made the application from the rear?

The Witness: He hadn't started making the application. I notified him before he made the application from the rear.

The Court: That was when the engineer—

The Witness: Made the reduction, yes, sir.

The Court: After that happened, the train started to pick up speed?

The Witness: After he made the reduction, sir, the train slowed down.

The Court: Then it started to pick up speed?

The Witness: Yes, sir, after he released the brake.

The Court: Picked up speed?

The Witness: Yes, sir.

The Court: And then it was the conductor went to the rear?

The Witness: Well, he was standing at the rear.

The Court: Standing at the rear?

The Witness: Yes, sir.

The Court: Then it was the conductor applied the brakes?

The Witness: Yes, sir.

The Court: You could stand on the stair and see the gauge?

The Witness: Yes, sir, from where I was standing holding onto the grab irons, I could see the gauge, and
67 see Conductor Cunningham.

The Court: Did you look at it?

The Witness: Yes, sir, off and on, back and forth.

The Court: What did that gauge show?

The Witness: Before he applied the brakes, or after?

The Court: Both.

The Witness: Before, between 50 and 55 pounds. After he applied the brakes, approximately 30 pounds. After he released the brakes, it was about 53 to 55 pounds of air.

The Court: You mean it was 55 pounds just before?

The Witness: I said between 55 and 60 before he applied the brakes. After he applied the brakes—

The Court: The air was reduced?

The Witness: Reduced to 38 pounds.

The Court: Then did it go back to 55 before that stop?

The Witness: I would say 50 or 53 pounds.

The Court: Before the stop?

The Witness: You mean before the conductor stopped the train?

The Court: Before the train stopped, whoever did it.

The Witness: Yes, sir.

The Court: 50 or 55 just preceding the time the conductor applied the brakes, is that correct?

The Witness: Yes, sir, between 50 and 55.

The Court: Then you looked at it, and you saw a
68 change in the gauge, and it went down to 38, is that
correct?

The Witness: Yes, sir, when the engineman made a reduction.

The Court: All right. Let us start all over again.

You looked at that gauge when you were in the cupola, didn't you?

The Witness: Yes, sir, that is right, sir.

The Court: And the engineer slowed the train down?

The Witness: Yes, sir.

The Court: What was the gauge just before he slowed it down?

The Witness: Between 55 and 60 pounds, approximately.

The Court: What was it after he slowed it down?

The Witness: 38, sir.

The Court: Then the train started to speed up, didn't it?

The Witness: Yes, sir.

The Court: Then what was the gauge?

The Witness: Between 50 and 55 pounds.

The Court: Went back to where it was?

The Witness: It was a little bit less.

The Court: And then it was the conductor went back to the rear end valve?

The Witness: Yes, sir, that is right.

The Court: Well, as he went back there, did the
69 gauge remain at 53 or 55?

The Witness: Around 53 to 55, yes, sir.

The Court: When the conductor applied the brakes, what happened to the gauge, if you saw?

The Witness: As he cracked the gauge slowly, let the air out, I will say 5 or 10 pounds came off. Then he opened it a little wider, and a little more came off. I don't recall what the gauge was when the brake went into emergency.

The Court: His back was toward you, if he was looking out toward the rear of the train?

The Witness: Yes, sir, the same direction I was in.

The Court: He was standing in front of the valve, wasn't he?

The Witness: He wasn't standing exactly, he had his back against the caboose car in the back, but the valve is right on the side here. He had his feet up against the ladder, pulling air that way. I could see his arm and hand, and the side of his body.

The Court: You couldn't see the valve?

The Witness: Yes, sir. The valve is back up here.

The Court: You can see it?

The Witness: You can stand in the cab and look out the door. The door was wide open.

The Court: He was to the left of the rear end?

The Witness: Yes, sir. That is right.

70 The Court: And the valve is right in the center?

The Witness: Almost in the center, yes, sir.

The Court: When this violent stop occurred, what hapaned to the conductor?

The Witness: I really don't know, sir. It threw me to the floor. It stunned me and dazed me. The next thing I can remember was him coming over, walking over to me, asking me if I was hurt.

The Court: How many feet were you thrown?

The Witness: Right offhand, I wouldn't know. I never measured it. I had no occasion to measure it.

The Court: As far as from you to the lady taking notes?

The Witness: I would say from the end of this partition over to the end of that partition, I would say.

The Court: Do you gentlemen want to stipulate as to the distance of that?

Mr. Savage: I will accept your estimate, Mr. Preston.

Mr. Preston: It looks like about nine feet to me.

Mr. Savage: It is actually between ten and twelve feet. We will compromise on eleven, if you say.

The Court: Get the ruler.

Mr. Savage: This is a 15-inch ruler. We will have to do it in 12 inches at a time.

I think you hit it right on the nose, nine feet. Congratulations.

71 The Witness: That is approximately it, sir. As I say, I have had no occasion to measure it.

The Court: Was this ladder attached to the side of the caboose or the end of the caboose?

The Witness: On the end of the caboose, sir.

The Court: You were thrown about nine feet?

The Witness: Wait a minute, sir. Let me ask you which ladder you are referring to.

The Court: You came down the ladder?

The Witness: You mean the steps coming down from the cupola. I thought you were speaking of the ladder on the end. How was that question again, sir?

The Court: Well, these grab irons you were holding onto, were they on the side of the caboose, or front, or rear of the caboose?

The Witness: They are on the side, coming down.

The Court: Then you weren't facing out?

The Witness: Yes, sir. They have them on each side. I was holding like this on the grab irons coming down on the side. I was standing in the aisle, you see.

The Court: With your hands stretched across the width of the caboose?

The Witness: Not the width of the caboose. The lockers come out to the middle of the caboose. You have four lockers.

The Court: Are the grab irons attached to the lockers?

72 The Witness: Part of the lockers, yes, sir.

The Court: You were stretched out the distance of the caboose between the lockers?

The Witness: Yes, sir, I would say approximately two feet, just an aisle through there, and four lockers, two on each side.

The Court: Were you thrown to the rear door?

The Witness: Yes, sir, to the north end.

The Court: That is the rear door?

The Witness: Yes, sir.

The Court: It could not have been the north end. You were going north?

The Witness: Yes, sir, what I am speaking of, I was thrown to the north end.

The Court: You were thrown backwards?

The Witness: Yes, sir, thrown backwards.

The Court: Then you were thrown to the front?

The Witness: Front, yes, sir. That is right.

The Court: And were you thrown against the partition, or thrown on the floor?

The Witness: I was thrown on the floor. My head, shoulders and all struck the stove and other obstacles around there.

The Court: They were up on the front end of the caboose?

The Witness: On the front, a coal stove, big table,
73 and stationary wash stand.

The Court: Anything further, gentlemen?

Mr. Savage: Nothing further.

The Court: Step down.

The Witness: Thank you, sir.

(Witness excused.)

* * * * * * * * * *

Dr. Isaac Gutman was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * * * * * *

79 The Witness: Good enough.

I first saw him, as I mentioned, on June 23 and he gave me a history somewhat as follows:

That he had had a disc operation in June of 1948 after which time he returned to work and worked for a period of about 18 months.

He had another accident on December 12, 1949, at which time he was thrown from the end of a caboose as the result of an emergency stop. He was treated conserva-
80 tively for a period of time and eventually was operated on. At that time, a spinal fusion operation apparently was performed and after his discharge, he wore a brace.

When I saw him, he came in complaining of pains in his back, inability to bend, numbness in the back of his right thigh and pain in the lower right leg and heel.

My examination revealed a 29-year old white male; that at that time was walking with a definite limp. He was wearing a Williams-type back brace which was removed for purposes of examination.

The routine physical disclosed nothing of note but an examination of the back revealed he had a healed scar in the mid line of the low back. That he was able to bend very little from the standing position and he complained of pain at the level of the scar and of tightness in that area when he attempted to bend.

On percussion or tapping of that area, he had marked tenderness over the scar and particularly to the right but the whole back was tender. He was not able to bend backwards or hyperextend or bend from one side to the other, a lateral rotation or twisting to the side was also limited. He was unable to do that.

From the prone position, when he was down on his abdomen, for example, he was unable to hyperextend, for example, to raise the head in the position of a swan
81 dive and various other tests indicated that he had
difficulty in bending his back or raising his leg with the leg straight at the knee. He complained of severe pain on the right side, the so-called straight leg raising test. The leg was held straight and is attempted to be brought upward. He complained of severe pain when he did that. Normally, you can do that to about 90 degrees with the average person.

On examination of his reflexes, we found them all to be present with the exception of his right ankle jerk indicating he had no ability to react at that level. There was also an inconstant area of diminution of sensation. He could not feel properly in the right side of his thigh and calf. In other words, in sticking him with a pin in certain areas, he felt normal sensation but in other areas, he did not.

I X-rayed him at that time and I found there were four metallic screws in his back in locations between the facets L-4 and L-5 and S-1 and these screws are placed low in the back between joints of the vertebra.

At that time, I got no evidence of new bone which had been laid down, in other words, no evidence of bone bank bone which apparently had been used. There was some obliteration of the joint space between the facets of L-4 and L-5 and, in the lateral view, the spinal processes, the part that you feel when you lean against a chair, was
82 gone because it had been used in the operation.

There was a narrowing of the disc space between L-4 and L-5. There was no evidence of arthritis noted at the time.

I had a comment at that time. Do you want me to read that or comment on it or merely stop after the examination?

Q. Let's have your comment. A. My comment at that time was something like this:

This man apparently had an operation for a disc in June of 1948 from which he completely recovered. He was able to resume his usual work and up until the accident of December 12, 1949, he had no disability.

Since the second accident, which was followed by a fusion, he has had pain in the back. His operation was performed on January 28, 1950, so it was approximately only five months since the fusion and too early to determine whether or not he would have any permanent disability.

Q. Did you see him following that and, if so, when? A. Yes, I saw him on August 23, 1950.

Q. Tell us what your examination consisted of and what you found. A. At that time he was still complaining of the pain and drawing sensation from his right heel to his right buttock, extending along the back of the right calf and thigh. He felt as if he was walking on a shoe which had no
heel. After standing on his feet for a while, the
83 right leg began to ache and when lying in bed, both
legs developed cramps in a nervous tension and would draw up. His back was still stiff and any effort to bend produced a pulling sensation at the upper end of his incision or scar.

My examination at that time revealed that he was still wearing his back brace and still walking with a relatively stiff gait.

An examination of the back revealed the absence of the normal lumbar lordosis which means an absence of the normal sway back. All people have a certain amount of sway back. He had none. He had marked restriction of flexion from the standing position, in other words, the ability to bend forward and he was also unable to lean backward or bend to either side.

He was tender over the upper part of the scar and there seems to be a separation in the underlying soft tissues in the upper part of the scar.

It was also noted that the right calf was smaller than the left and, on measurement, there was an inch difference, the right calf being 14 inches and the one on the left being 15 inches. The thighs were about equal. There was a quarter of an inch difference.

There was no tenderness of either sacroiliac joint but the straight leg raising test was still positive. He still
complained of pain. In other words, at 30 degrees,
84 just barely above the table with his right leg and
with his left, 70 degrees, so he could raise the left considerably farther than he could the right. He still had the diminution of sensation over the posterior portion of the thigh.

I took no X-rays at that time but I still felt that this man was unable to do any type of work.

Q. Did you see him following that, Doctor, and, if so, when? A. I did. I saw him again on November 1, 1950.

Q. What did you find at that time? A. At that time, he still had complaints referable to his back, particularly stiffness in both legs and at that time he stated it was worse in damp weather. He was unable to get along without his back brace. He was still limping and he felt that he was making no progress. He has gained some weight and was now weighing 173 pounds.

Examination of the back at that time still revealed marked limitation of flexion. He was still unable to bend. He was spastic. The muscles were very tight so the muscles were taut.

He was still tender over the operated scar and lateral bending and rotation were still restricted. At this time, straight leg raising on the right was better than it had been previously and was not positive until 70 degrees had been
reached while on the left, 80 degrees. His knee
85 reflexes were present and equal and the right ankle

jerk was either absent or markedly sluggish while the left was active and brisk.

The Fabere test was still negative and he was still wearing a back brace.

I took some X-rays on this date, November 1, and they were reviewed and compared with the other X-rays and they showed no essential change.

I commented that the apophyseal joints between L-4 and L-5 and S-1 were bridged by screws and might possibly be fused and the comment was while this man's complaints are essentially the same, on physical examination he seems to be slightly better since he has a greater range of straight leg raising than on the previous examination. However, I still felt that he was in no condition to do any type of laborious work and at that time I commented that it might be to his best interest to change his occupation rather than return to the type of duty that railroading required.

Q. What did you feel the prognosis at that time was regarding his ability to return to railroading? A. I thought it was poor at that time.

Q. In other words, prognosis means that it was doubtful for the future? A. That is right.

Q. Did you see him following that, Dr. Gutman,
86 and if so, when? A. I did. I saw him again on January 2, 1951, and the examination was essentially as before.

His back was flat. The straight leg raising was still positive on the right and he was still tender over his lumbar spine.

At this time I said this: I said insofar as I can see, this man has shown no improvement from the first examination and it is not at all likely that he will ever be able to return to railroading.

It is suggested that he look for a different type of employment and that this be of a variety that it will not require prolonged standing, walking or lifting; in other words, light work.

Q. And the date of that examination was what, Doctor? A. January 2, 1951.

Q. Did you see him following that and, if so, tell us what you found? A. I saw him again on April 9, 1951, and on this examination he was still limping. He finds that his right leg feels short and is drawn up and the muscles in his back get tight. His nerves are always on edge and he feels that the skin of his foot is cold.

87 Examination at that time revealed marked restriction of flexion of the back; marked tenderness over the entire lumbar spine; the gluteal creases are level and there is no inequality of leg length but there is some pelvic tilt when he walks, meaning he was throwing his body to the side but his legs were an equal length. Neither leg was shorter than the other.

My comment at that time was that this man apparently still had not improved under the present treatment and I suggested that he wear a quarter of an inch lift on his right heel because of the way he was walking and also that physiotherapy be used, in other words, heat and massage, in an attempt to try and improve his condition.

* * * * * * * * * *

92 Q. Did you see him subsequent to the examination you have just described? A. Yes. I saw him again on June 13, 1951.

Q. State what your examination consisted of and what you found. A. He still complained of pain in his back, pain in both legs but more particularly the right. The pain in the right leg, apparently, went all the way down his leg to his heel. He had gotten no relief from the quarter inch lift on his shoe and he had discarded it.

He was wearing his brace, not regularly, but off and on and felt that he was not improving. He stated that if he tries to do any work at home around the house, he has to lie down and rest.

He was sleeping poorly and stated that he had not slept well since the operation.

The examination revealed this peculiar right-sided limp which he has had since I have seen him. His back was still flat and there was loss of the normal lordosis, normal sway-back. He still had definite restriction of flexion and any attempt at hyperextension was painful, in other words, leaning backwards, lateral bending, bending to either side and rotation was also restricted.

93 He squats stiffly although he can get partly down. He was unable to flex his thigh completely on his abdomen and I felt that was part of his reason for his inability to squat. He had tenderness over the lumbar spine and over the scar.

His reflexes, as before, present at both knees and at the left ankle, but the right ankle was absent.

The measurements of his calf at this time revealed 13½ inches on the right and 14¼ on the left. The thighs were one-half inch in difference, the left being 16½ and the right 16. A straight leg raising on the left could be performed to 70 degrees and to about 60 on the right. He still had patches of diminution of sensation along posterior lateral right side.

I took some X-rays at this time in an attempt to see whether he had a solid fusion and I took them on his back and then moved his leg to the left to see whether there was any motion between lumbar 4 and lumbar 5 and the sacrum as we talked about and I have some X-rays showing, in my mind, some movement; in other words, not a clear-cut fusion. Apparently, he does not have a solid fused spine.

93 Q. And the purpose of this fusion is what? A. To make it so that there is no motion.

Q. You don't feel that result was achieved here? A. With these X-rays, I think I can demonstrate some motion.

94 Q. Will you show those to us, please, Doctor? A. This is taken with him flat on his back. This is taken the same date but after he had been flat on his back, I shifted his leg and body to the left in an attempt to see

whether there was any motion. Theoretically, if there is no motion, these screws should be able to be superimposed without any change and after superimposing the two lower ones almost to the point where they overlap, you can see there is some motion in the upper screws which indicates to me that there is probably not a solid fusion between here and here (indicating). In other words, in this case what we have been calling L-4 and L-5, above it you can see definite motion. Above, it is almost a half inch, here (indicating) a quarter of an inch and here possibly between an eighth and three-sixteenths and here (indicating) it is beginning to move so there is a definite shift up high but that is above the fusion area. We are not particularly interested in that. What we are trying to find out is that he has fusion at this level (indicating).

At least, there is some difference in opinion. If you take a piece of wood with four screws in a fixed position, you should be able to X-ray them superimposed on each other. On the lateral view, lying on his side and flexing them forward, there apparently isn't as much motion.
That may be because he either had spasm, that is,
95 tightness of his muscles. These (indicating) superimpose pretty well. Even here (indicating) there
is some motion. The head of the screw here (indicating) is just about on, but not a great deal off. The head is just about superimposed but there is some forward motion. The bones, however, if you can follow the outline of the shadow—there is very little shift in the bones themselves. You can almost superimpose them without any motion at all, just the tiniest bit, possibly, except above, where you get up to L-3 and L-4 and then there is some motion but between L-4 and L-5 and L-5 and S-1, there is very little motion.

Q. Doctor, the previous X-rays that you identified as superimposed one on the other were taken in what view? A. I beg your pardon? I didn't quite get that, Mr. Savage.

Q. The X-rays that you showed us just before the last, which showed some motion, were taken in what view? A. In the AP view, on his back.

Mr. Preston: I am sorry, I didn't understand you.

The Witness: The AP view, meaning anterior posterior, front to back and the others in the lateral view or they were shot at an angle of 90 degrees.

By Mr. Savage:

Q. Which shows the more motion? A. The AP view, front to back.

96 Q. And the lack of motion in the lateral view may be due either to inability to bend forward to get the movement or muscle spasm? A. That is right, sir.

Q. You spoke of a patch of diminution of sensation. By that I understand you mean the feeling was decreased? A. That is right.

Q. With the various pin prick tests? A. That is right.

Q. Did you tell us your comment as to your examination of June 13? A. No, I did not.

Q. Will you please let us have it? A. My comment at that time was this man had made no clinical improvement during the time that I have observed him. The X-rays show some motion of the spine in lateral bending so that it is questionable whether he has a true fusion between L-4 and L-5 and L-5 and S-1.

Q. It is your opinion that he does not have a solid fusion? A. That is right, sir. It is very questionable.

Q. The absence of solid fusion would give rise to what symptoms? A. Usually pain.

97 Q. The various tests which you performed, the straight leg raising test and so forth are done with a view of ascertaining what? A. Whether this man really had symptoms or just merely complaints.

Q. And as the result of this test, you arrived at what conclusion? A. I feel that he has complaints and symptoms. In other words, he has definite pathology; something is wrong.

Q. Doctor, do you feel this man is able to return to railroading now or as of June 13, at the time of your examination? A. No, I feel that Mr. Brooks is not physically able to do any type of heavy work at all.

Q. What type of work do you feel he could do? A. He probably would have to find a job where he—

Mr. Preston: I am not sure that the doctor is qualified to answer that.

The Court: He can testify as to what type of work he is physically able to perform, not as to whether he probably can find a job.

Mr. Preston: That is what I had in mind.

Q. What type of work is Mr. Brooks physically able to perform? A. I would say a sedentary type
98 of work, the type of thing which would require some
sitting, some standing, no stooping, no lifting and certainly nothing heavy, such as pushing or pulling.

Q. A job where he could change his physical position frequently? A. That is right, sir.

Q. Could he work with regularity at any one of the jobs you have described? A. Well, of course, that is difficult to say. He might be able to get by if he could shift his position enough from time to time; in other words, up as he fit and sitting down when he saw fit and, if necessary, even lying down. I don't know.

Q. Do you feel his condition is permanent? A. Yes, I do. I have seen him now over a period of a year. It goes back just about a year, I believe. I have seen no change at all in this man, unfortunately I would say.

Q. The last examination was just a week ago and your first examination was June 23, 1950? A. That is right, sir, about a year.

Q. So it is approximately a year and during that series of examinations, you took a number of X-rays? A. Yes, sir.

Q. And I believe you said you prescribed a heel
99 lift, that is, the raising of the shoe? A. That is right.

Q. Which didn't help. Doctor, do you think he is able to do the work, say, of a file clerk?

Mr. Preston: I object to that question, if the Court please, because that is exactly the kind of thing that I don't believe the doctor can go into. He gave us his opinion that he can stand and sit down and move from time to time as a given job may require but I don't think we ought to make a personnel officer out of Dr. Gutman here.

The Court: Overruled.

By Mr. Savage:

Q. Will you answer the question, please, Doctor? A. I think he might have difficulty at times, depending on the type of office. Let's say if he were in a busy office which required a great deal of filing and stooping, he might have difficulty.

Q. You mean stooping, putting letters in a file? A. At a low level. In other words, in the first drawer of, let's say, a four-drawer file, the bottom is what I am driving at and if he had to stoop down and do it frequently, I think he would have difficulty.

Q. Do you feel his limp is permanent? A. Yes.

100 Q. Do you feel the condition you described on your examination on June 13, 1951, is permanent? A. Yes, sir.

Q. Is there or is there not any possibility of L-4 and L-5 and the sacrum fusing together solidly? A. There is a possibility, yes. There is always a possibility.

Q. Is it likely at this point? A. Not likely.

Q. Pardon? A. I say not likely but there is a possibility.

Mr. Savage: The witness is with you, Mr. Preston.

Cross-examination

By Mr. Preston:

Q. I have a few questions, Doctor. So far as the process you used to determine whether or not there is any residual motion left in Mr. Brooks' spine, do you keep up with the medical journals and opinions so far as the orthopedic specialty is concerned? A. I try to, yes, sir.

* * * * * * * * * *

Q. Is there not a pretty well recognized conflict now in orthopedics as to whether or not the process you have described is capable of determining whether there is or is not complete fusion? A. That is true, sir.

Q. However, is it your opinion in this case that
101 bony fusion is, I believe you used the word "questionable," is that right? A. That is right.

Q. However, you do recognize that there is such a conflict of opinion as to whether or not that process can determine mobility, whether pseudo arthrosis or arthrosis as such? A. Right.

Q. Another phase that struck my ear was "complaints and symptoms." I take it you mean from symptoms, conditions that have an organic art, objective art? A. Probably I should have used the words objective findings and subjective complaints.

Q. Could you describe to me your differentiation between the two? A. Well, objective findings are things that the average physician, whether it be an orthopedist or not, can see as a definite physical finding; muscle spasm, shortening, deformity, redness, local heat, swelling, things like that. They are objective findings, something that can either be seen or felt or heard, as in the chest, for example.

Subjective complaints are those voiced by the individual and can only be determined by the individual. In other words, if I say I have a pain in my back or pain in my arm,
no one else can see it. No one else can feel it, only
102 the individual complaining.

Q. Doctor, isn't it true that, in a great many instances, there is a strong interplay between the appearance of objective symptoms and subjective complaints, that the intensity of one varies with the intensity in the other? A. I think that is true, yes. There is no question about it but I think that is also being human. I think that goes along with the average individual.

Q. But you don't have any doubt that there is an interplay there between the two? A. None whatsoever, sir. It is a new branch of medicine, psychosomatic medicine which is making a great deal of use of it.

Q. Doctor, as an orthopedist and a man of considerable experience in back injuries and problems, as I understand from your qualifying testimony, is it not also true that rest, quiet and relaxation ordinarily are effective, shall we say, in treatment for orthopedic problems of the back? A. Yes, that is true.

Q. Is it not true also that there are very few back conditions that do not respond favorably to, as I say, bed rest and quiet, particularly this bed board treatment? A. I would have to qualify that. I couldn't answer that yes
or no. I would say that probably as high as 80 per-
103 cent of all back problems would respond to simple
bed rest, bed board, local heat, sedation and plenty of time but there is a percentage that do not.

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108 Q. In this particular case, Doctor, Mr. Brooks was
thrown a distance of approximately nine feet. He was holding onto grab irons. The force of the sudden stopping or the running in of the caboose, in which he was holding onto the grab irons, was severe enough to break his hold and throw him to the end of the caboose up against the wall of the caboose or the wash stand or some other object that happened to be there; stunned, dazed him, and he was thrown, striking his back against one of these objects with great force. He was given conservative treatment for a period of approximately six weeks, consisting of some hospitalization, I think for six days, and then 35 days of rest.

Assuming now that he had spasm, that the blow was a violent one, would that be sufficient to cause an unstable back six weeks after the occurrence of the accident. A. I think I could go along with that, yes, sir. I think
some work has been done in the past showing that
109 pain, simulating pain that you guess in the disc, can
arise from the joints of the facets and certainly in any injury severe as that, you could certainly get some mal-

alignment, if you want to call it that, or some distortion of the relationship between the joint itself.

Q. Doctor, assuming now that Mr. Brooks was operated on for a herniation nucleous pulposis on June 17, 1948; that he returned to work on August 17, 1948, wearing no brace, support or appliance; that he returned to his work of a railroad brakeman and worked steadily up until the most recent accident, can you say whether or not the first operation, at which time the disc was removed but no fusion performed, was successful? A. I would say it was a good job, mighty good one.

Q. Would you say it was a successful operation? A. Yes, I would. I would say it was very successful.

Q. Would you say the man would have to have a good back to return to work in 60 days following a disc operation? A. I would say definitely yes because many people, in six months' time, can't go back to doing things like playing golf.

Q. A disc operation is the same as an operation for herniation nucleous pulposis? A. That is right.

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115 The Court: In the absence of bony union in the future you would expect continued pain and lack of function?

The Witness: Yes, I would. As a matter of fact, if it were my back, chances are if it kept up I would probably have an exploratory to be sure I didn't have a true orthosis.

The Court: Go in there again and fuse it?

The Witness: Yes.

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121 **Virginia M. Brooks** was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Mrs. Brooks, will you give us your full name, age, and address? A. Virginia M. Brooks; 29 years old; 2302 (a) Park Avenue, Richmond, Virginia.

Q. Try and talk a little louder so we can all hear you.

Are you employed, Mrs. Brooks? A. Part time. I have to work a little bit to take care of my child.

122 Q. You are not employed full time? A. No, sir.

Q. You are the wife of Mr. Thomas M. Brooks, the plaintiff in this case? A. Yes, sir.

Q. And you have been married how long? A. Almost 8 years.

Q. I understand he has been employed on the railroad for approximately nine years? A. Yes, sir; nine years when he got hurt.

Q. What was the condition of his health up until 1948 when he had his first accident? A. Perfectly healthy in every way.

Q. And he was operated on then and returned to work August 17, 1948, is that correct? A. Yes, sir.

Q. What was the condition of his health when he returned to work in August of 1948? A. He was normal again. I mean he got very active.

Q. I can't hear you. A. He worked good after that and felt fine.

Q. Then he was injured in December of 1949? A. Yes, sir.

Q. For which he was operated on January 28, 1950? A. Yes, sir.

Q. How did he recover from that operation inso-
123 far as you could observe? A. Well, ever since then
he has been awfully nervous and complains of his back and legs all the time and can't sleep good at night. He just can't get around like he used to, nor bend.

Q. With regard to his energy, have you noticed any difference in his condition? A. Well, he can't do anything without getting awfully tired and broken down and his back hurts him if he even walks very much.

Q. Has he done anything around the house to help you since his injury? A. He cooks supper and little things that he can do without too much exercise.

Q. You said after his first operation, he returned to work. Did he work regularly? A. Very regular.

Q. No complaints of pain in his back? A. No, sir.

Q. And he slept well then? A. Very well.

Mr. Savage: The witness is with you.

Mr. Preston: I have no questions.

The Court: Stand down and take a seat in the courtroom.

(The witness was excused.)

124 Mr. Savage: Your Honor, at this time we would like to offer this stipulation:

"It is agreed between counsel that Mr. Brooks did not miss a single day because of illness between August 17, 1948, the day that he returned to work following his first operation and December 12, 1949, the day of his second injury."

Is that correct, Mr. Preston?

Mr. Preston: So far as I know, that is correct, Mr. Savage.

Mr. Savage: Call Mr. Florence, please.

Thereupon, **John William Florence, Sr.**, was called as a witness by the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Mr. Florence, will you tell us your full name, age, and address? A. John William Florence, Sr.; 35 years old, 2108 Harwood Street, Richmond 24, Virginia.

Q. And your present occupation? A. I am a licensed examiner for the Virginia Division of Motor Vehicles.

Q. Were you in the employ of the R. F. & P. Railroad? A. Yes. 125

Q. When did you start and when did you leave? A. I was employed April 21, 1942, and resigned April 5, 1950.

Q. You were employed by them in what capacity? A. As a conductor; served in that capacity until my resignation. I was employed as a brakeman and promoted to a conductor in 1944.

Q. Freight conductor? A. Freight and passenger, both.

Q. You know Mr. Brooks, do you? A. Yes, I do.

Q. You have known him for some time? A. Yes, I have, sir.

Q. Were you on the train on which Mr. Brooks was injured on December 12, 1949? A. I was, sir.

Q. That train was enroute from Richmond to the Potomac Yards, Alexandria, Virginia? A. Yes, sir.

Q. Had a Diesel of four units and 112 cars? A. Yes, sir.

Q. With a caboose on the rear? A. Yes, sir.

126 Q. And you were employed then as what? A. Front brakeman.

Q. As such, you were located where? A. On the A unit of the Diesel engine, the rear A unit.

Q. How many units does the Diesel have? A. Four.

Q. Approximately how long was that Diesel and the four units? A. Your question again?

Q. Approximately how long was the Diesel and the four units? A. You mean the length of the engine, the Diesel engine itself composed of four units?

Q. That is right. A. Well, 200 feet, or less.

Q. Did you have air gauges in your section? A. Yes, sir.

Q. Joining the train line pressure? A. Yes, sir.

Q. Will you tell us what happened as you approached Milford, Virginia, on that day? A. Approximately two miles south of Milford, Virginia, we were traveling at a

speed between 50 and 55 miles per hour. I looked out the east side of the Diesel engine on a curve there that
127 was to the engineman's side and about midway of the train, I saw some smoke flying and about the same time, the engineman looked back toward me and he gave me a signal after I had pointed to this condition back there, gave me a signal which indicates in this motion (indicating) that it is sticking brake and I repeated the signal to him and he immediately made a reduction in his air, about 20 pounds more or less and slowed the train down to approximately 15 miles an hour. He released the brake, opened his throttle and began to pull the train ahead just as if he were going to continue on his journey and he was pulling at the time—we were running about 25 miles an hour when we came to a very abrupt stop and the train stopped north, that is, the Diesel unit stopped just north of Milford station about two miles from the point of the first application or the point where I saw the smoke flying the first time.

Q. What does the reduction in air do? A. It applies the brakes.

Q. As I understand it, you have pressure on the reservoir side and pressure on the train line side and, in order to make an application of the brakes, you reduce the air pressure on the train line side which permits the reservoir side to apply the brakes, is that correct? A. Yes, sir.

Q. The reduction he made was what kind of reduction? A. A normal reduction of 21 to 25 pounds of air.

128 Q. Is that also known as a service application? A. A service application, yes, sir.

Q. You say you went approximately two miles from the time he made the service reduction? A. Yes, sir.

Q. And then what kind of stop was made? A. A terrific stop. I don't know how to explain it except the whole train seemed as if it would come up inside the Diesels. It was a terrific impact.

Q. What caused that, if you know? A. I don't know except it apparently was an emergency stop. All of the air was drawn. There was no longer any reading on the air gauges at all.

Q. What reading was there on the air gauge when the emergency stop came? A. It was a little better than 50 pounds.

Q. So that would mean, then, around 50 pounds application? A. Indicating that, yes.

Q. If the air went down to zero? A. That is right.

Q. Which you describe as an emergency stop? A. Yes, sir.

Q. Did the engineer make that reduction. A. No, sir.

129 Q. Where was it made from, if you know? A. From the rear.

Q. You mean the caboose? A. Yes, sir.

Q. That is the only place it could have been made? A. That is right, sir.

Q. Is there a valve on the caboose for the purpose of applying the brakes? A. Yes, sir, two of them, sir.

Q. That is known as the conductor's valve? A. Yes, sir.

Q. Do you know what caused that very rough stop which you describe as terrific? I mean just how did it happen? What was the physical force which produced it, if you can tell us? A. It was comparable to running into a brick wall with an automobile at a terrific speed.

Q. Maybe I didn't make myself quite clear. There is a certain amount of slack between each car, isn't there? A. Yes, sir.

Q. How much? A. Well, I think it will average somewhere between three and six inches.

Q. Pardon? A. Three to six inches to each draw head.

130 Q. So there would be approximately a foot in each car? A. That is right.

Q. And with 112 cars, you would have approximately 112 feet of slack? A. That is right, sir.

Q. And when the engine is pulling these cars, the slack is stretched, is that right? A. Yes, sir.

Q. And if the brakes go on in the engine in the front cars first, then the rear cars would run into the front cars? A. Yes, sir.

Q. Is that what you meant when you said it felt like you were running into a brick wall? A. That is right, yes, sir.

Q. If the brakes are applied evenly on all the cars, the rear cars as well as the front cars and a service reduction is made, what kind of stop would you get? A. You get a normal stop, not too rough.

Q. This was not that kind of stop? A. No, definitely not.

Q. Do I understand that you felt that impact up in the engine? A. Yes, sir, very much so.

Q. Would it be more severe in the caboose? A. Yes, sir.

131 Q. What kind of brakes does a four-unit Diesel have? A. It has a brake on it that is very similar to passenger equipment. It is a high-speed brake. It is very positive in its action and quick in its action.

Q. When you saw this smoke coming from the train, that was about how far back from your engine? A. Oh, between 50 and 60 cars; about midway of the train.

Q. That is approximately? A. Yes, sir.

Q. Was it dense smoke? A. It was very dense, yes, sir.

Q. Could you tell what it was? A. From the color of the smoke, I would have reason to believe it was a hot box.

Q. And you so notified the engineman? A. Yes, sir.

Q. And the engineman happened to be Mr. Reid, the assistant road foreman of engines? A. Yes, sir.

Q. He gave what kind of signal to you? A. A sticking brake motion, sliding your hands (indicating).

Q. What is the signal for the hot box? A. Holding your nose and pointing at the journal.

132 Q. Is there a peculiar odor emitted by a hot box? A. Very definitely so.

Q. As I understand it, the instructions to the train crew is to stop if a hot box develops——

Mr. Preston: I object until we establish whether or not he knows what those instructions are.

Mr. Savage: I thought that was conceded. I will withdraw the question.

By Mr. Savage:

Q. Do you know what the instructions to the train crew are with regards to the motion of the train if a hot box is discovered while the train is in motion? A. The instructions are to stop immediately and ascertain the cause of the condition.

Q. Do you know the reason for that rule? A. Promote safety.

Q. What is unsafe about a hot box? A. Well, if it is continued to run in an unsafe condition when it is extremely hot, the end of that journal will break off and wreck your train.

Q. After the train stopped from the emergency application, what was done? A. I got off the rear unit of the engine and walked to the head end and the engineman was
still in his seat in the Diesel unit and I asked Mr.
133 Reid if he applied the brake and he said no, the
conductor——

Q. Wait a minute——

Mr. Savage: Do you object to this?

Mr. Preston: I think it is within the bounds——

Mr. Savage: It is hearsay, very definitely.

By Mr. Savage:

Q. You can't say what the engineer told you. You can only say what you saw and what you did. You had a conversation with the engineer? A. Yes, sir.

Q. And following that, what happened? A. I looked towards the rear and Conductor Cunningham was giving a light jar ahead signal which means that he wanted us to pull ahead very slowly and I waited at the switch leading to the yard there at Milford. Conductor Cunningham made the cut in the train and pulled on up to a position just a little north of the switch that led out of Milford yard.

The local freight was at Milford and it is customary for them to assist in disposing of a car if they are available at any of those points so I opened the switch to let the local freight come out and pick up the car from our train which they did. They picked up the car and pulled it back in the yard in the clear.

134 I throwed the switch back and Conductor Cunningham rode the train on back and made the coupling.

Q. As I understand what you are telling us is that the car with the hot box was taken out of the train? A. That is right.

Q. And put on a siding, is that right? A. Yes, sir.

Q. Did you see the hot box at that time? A. I did.

Q. Would you describe it, please? A. Well, the car was very hot. The box was blazing and the journal was cherry red from the heat.

Q. You mean it was on fire? A. Yes. The packing and the journal box was on fire, yes, sir.

Q. What was cherry red? A. The journal which, of course, is the axle.

Q. Would you consider it safe to have proceeded with that car? A. No, sir.

Q. When Conductor Cunningham gave you this jar ahead signal, he was at the caboose? A. No, he was where the car was that was on fire.

Q. He had walked up to that? A. Yes. He walked up to the hot box.

135 Q. That train consisting of 112 cars was approximately how long? A. A mile and a quarter.

Q. What, if any, means of communication did the engineer have with the caboose or vice versa? A. None.

Q. You mean there was no way for the engineer to communicate with the trainman in the caboose? A. No, sir, not while the train was in motion.

Q. And no way for the trainman to communicate with the engineer? A. No, sir.

Q. In the event that the trainman in the caboose discovered some condition and wanted to communicate that to the engineer, assuming it was not on a curve, how would it be done? A. It couldn't be done except to stop the train.

Q. By the application of air? A. Application of air and then go up and tell him whatever you want him to know.

Q. You mean walk a mile and a quarter? A. That is right.

Q. Can you get a normal service application of the brakes by the use of the conductor's valve in the caboose? A. Yes, sir.

136 Q. And what is the method of doing that? A. Well, the valve is pulled forward very slowly to let a small amount of air out at the time until the brakes are set on the train and the train stops. You can get a service application from the rear.

Q. And if you get a service application, you won't have that run-in or that terrific impact that you describe? A. Very definitely not, no, sir.

Q. With regard to the mileposts, do you know where it was that you first discovered the hot box? A. About the 36th milepost.

Q. And you went to what milepost before you stopped? A. Beyond the 38th.

Q. Have you noticed any difference in Mr. Brooks' condition, insofar as you can see, before and after this accident of December 12?

Mr. Preston: I object to the question whether Mr. Florence has seen him, had a chance to observe him.

Mr. Savage: You are perfectly right.

By Mr. Savage:

Q. Have you seen Mr. Brooks very often since his accident of December 12, 1949? A. Yes.

Q. Approximately how often? A. Well, on the average of once a month at least.

Q. And prior to that, how often did you see him?
137 A. More often since I was working with him.

Q. Have you noticed any change in his condition? A. There is quite a bit of change in his condition.

Q. Will you describe it, please? A. Well, prior to this accident in 1949, Mr. Brooks was one of our most capable men, so far as his ability to railroad was concerned. He was active and alert but, since he has been injured, I can a distinct difference. He is not as active or alert as he was. He is not, well, shall we say, in any condition to perform his duties comparable to the condition that he was in prior to this accident. In other words, he had no limp and he could handle himself very well.

He could climb cars. He could board cars. He could get off of cars. He could apply brakes. He could do all that before he was hurt and I am quite sure he cannot do it now.

Q. Will you tell us, briefly, the duties of a freight brakeman? A. The duties of a freight brakeman, first of all, are to report to his conductor for instructions. It is his duty to apply brakes——

Q. What do you mean by that? A. Hand brakes.

138 Q. What is the hand brake? A. A hand brake is a mechanical device used in the absence of air to stabilize a car on the track or siding.

Q. Each car is required to be equipped with air brakes and a hand brake, is that true? A. Yes, sir.

Q. And in the case of a staff brake, a hand brake, it is a shaft coming up from the bottom of the car with a wheel on top, is that correct? A. Yes, sir.

Mr. Preston: If the Court please, I can't understand the relevancy of these questions on hand brakes and I object to the questions for that reason.

The Court: I assume it is for the purpose of showing that that is one of the duties of a brakeman, that Mr. Brooks is not able to apply those brakes because it takes force to turn the wheel. Is that it?

Mr. Savage: That is the only point.

By Mr. Savage:

Q. And this wheel extends up on top of a car and there is a brake shelf approximately two feet long and eight inches wide and the man stands on that brake shelf and turns the wheel and thereby applies the brakes on the car, is that correct? A. Yes, sir.

Q. And there are certain types of brake, shaft,
139 Ajax, Whipco, Miner, and so forth. As I understand
it, the purpose of the hand brake is so that you can control the speed of the car when the car is detached from the train, is that right? A. Yes, sir.

Mr. Preston: I object to all this line of questioning, if the Court please, unless Mr. Savage comes to the point. I think we are wasting time.

The Court: Yes. I think what it is used for is rather irrelevant. First, whether or not a brakeman has to apply it and, if he does, whether or not it takes the force and energy which Mr. Brooks now lacks. That is all there is to it.

By Mr. Savage:

Q. It might be necessary, in the course of a day's operation, for the brakeman to use this brake many times? A. Yes, sir.

Q. In addition to that, what are some other duties which requires nimbleness or agility? A. Climbing cars, for instance; boarding a car, for instance; getting off a car, throwing switches, making the cuts between cars and so on.

Q. Is it necessary, in the course of that work, to get on
and off moving cars? A. It is not required to get on
140 and off the moving equipment.

Q. Is it necessary to go over moving trains? A. No, sir, it is not required.

Q. When making cuts or coupling cars, is it necessary to bend? A. Yes, sir.

Q. And you have to couple and uncouple cars frequently? A. Yes, sir.

Q. Did you have occasion to see Mr. Brooks often after he returned to work in August of 1948? A. Yes, sir.

Q. Did you know approximately how often you did see him between August 17, 1948, and December 12, 1949? A. Several times weekly.

Q. Do you know whether or not he was able to perform his duties regularly? A. Yes, sir, he was.

Q. Insofar as you know, did he have any trouble with his back? A. Not a bit in the world.

Mr. Savage: The witness is with you, Mr. Preston.

Cross Examination

By Mr. Preston:

Q. Mr. Florence, how long did you work with the
141 railroad? A. Seven years and 16 days.

Q. Prior to April of 1950, is that correct? A. Yes, sir.

Q. I believe you testified that you were at the time in question here, you were riding on the engine on the east side, is that correct? A. State your question again. I didn't understand you.

Q. Is my recollection of your testimony correct in that you said you were riding on the east side of this northbound train? A. When what happened? What do you mean?

Q. Were you standing there at the time when you say Mr. Reid gave you the sticking brake signal? A. Yes, sir.

Q. Were you standing on the engineman's side? A. Yes, sir.

Q. That is the right-hand side of the engine, is that right? A. Yes, proceeding north.

Q. Who was on the left-hand side? A. Who was on the left-hand side?

Q. Yes. Who was on the fireman's seat? A. I couldn't tell you.

Q. Do you know what the name of the fireman was?
142 A. I know who was supposed to be there but I couldn't see through the engine.

Q. Who was supposed to be there, Mr. Florence? A. Mr. Watson.

Q. Which side of the train was this hot box actually on? A. East side.

Q. On your side? A. So far as I could see the smoke. I couldn't tell you which side it was on from where I was.

Q. You saw smoke on your side of the train? A. Yes, sir.

Q. On the east side of the train, is that correct? A. Yes, sir.

Q. When did you first actually see this box that you described as being so hot? A. In the curve just south of the 36th milepost.

Q. Do you mean by that that you saw smoke? A. This smoke, yes, sir.

Q. What I mean is when did you actually look at the box? A. I saw the box after it was stopped up there where we set it off.

Q. Will you try and recall at that time on which
143 side of the car was that hot box? A. I wouldn't be
certain.

Q. From where you were standing in relation to Mr. Reid at the time in question, on the east side of the train, that is, the engine side, could you actually see the various levers that he had to work with? A. No.

Q. I mean the throttle and so forth? A. No.

Q. He was in front of you, in other words? A. That is right.

Q. He also had certain gauges and meters and things up there for the speed of the train and air and various other things of the train? A. Yes, sir.

Q. Was he also between you and those gauges? A. Yes, sir.

Q. I believe you said that at the time the brakes were applied from the rear the train, you felt, was making 25 miles an hour? A. Yes, sir.

Q. Is that an estimate on your part? A. That is an exact figure on the speedometer reading.

Q. You were looking at the speedometer? A. Yes, sir.

144 Q. Is that correct? A. Yes, sir, right at the speedometer.

Q. Your view of it was not obstructed? A. No, sir, absolutely not.

The Court: Were you in the cab with the engineman?

The Witness: May I explain?

The Court: I just don't get where he was.

Mr. Preston: Answer the Judge's question.

The Court: Where were you?

The Witness: Your Honor, the A unit of a Diesel is the pointed unit and can be used either forward or backward. The A unit that I was riding in was out of service, so far as the brakes were concerned, that is, the handle that the engineman use were out of service but that A unit has all the gauges of the lead locomotive. Those gauges are exactly the same and they operate with the others. In other words, if the engineman applies the brakes, it shows on the brakes of the A unit that is in the rear.

The Court: You were in the engineman's position?

The Witness: On the rear unit.

The Court: Of the A unit?

The Witness: Yes, that is right.

The Court: That is several hundred feet back of the engine, isn't it?

The Witness: Yes, sir.

The Court: And looking out the engineman's window?

145 The Witness: I wasn't looking at any particular window at that particular time.

The Court: You were looking through it, weren't you?

The Witness: There wasn't anything I could see except the car right behind the A unit.

The Court: Where did you look to see the engineman give the signal?

The Witness: I got out of the seat and walked and looked out the window front towards the engine.

The Court: You looked out the window, then, didn't you?

The Witness: Yes, the curve being on that side.

The Court: I thought you said you didn't look out the window.

Mr. Preston: I myself am confused now.

By Mr. Preston:

Q. Where were you, Mr. Florence, when Mr. Reid gave you this signal and you gave it back to him? A. I was on the east side of the locomotive.

Q. But were you riding in the A unit with Mr. Reid? A. No, I was in the rear.

Q. Way back? A. Not so far. His unit and the two B units and the other A unit that I had.

Q. Were you standing right behind Mr. Reid's shoulder?
A. No.

146 Mr. Savage: He said he was 200 feet away.

The Court: Explain where the lead unit is and where you were.

The Witness: Assuming we are traveling this way (indicating) and this is the A unit which is a pointed unit, a front-end unit like you have seen on the Diesels around here. This one has all the controls on it. This one back here (indicating) is the same kind of unit except it is turned around.

These are B units, idle units. This one back here has a windshield and pointed unit. This one (indicating) has gauges. This one (indicating) has gauges. They operate together.

Does that make it clear to you what the different units are? These (indicating) are blunt units. These (indicating) have a pointed front on them.

By Mr. Preston:

Q. Mr. Florence, the train moving this way, will you indicate on this lead A unit where Mr. Reid was sitting? A. Sitting on this side (indicating).

Q. The right-hand side? A. The right-hand side.

Q. That is a traditional place for the engineers, is that right? A. Yes, sir.

147 Q. And isn't it also traditional that the fireman sits over on the left-hand side? A. I don't know what you mean by "traditional".

Q. That is where he sits? A. That is the normal place where he sits.

Q. Right over here (indicating)? A. Yes.

Q. All locomotives are made that way, I mean all on the R. F. & P.? A. Diesel units we are talking about, yes.

Q. Will you place yourself on the correct side of the unit in which you were riding, where you were? A. At what time?

Q. At the time when Mr. Reid gave you the signal. A. Right back here (indicating).

The Court: And you were in the engineman's position?

The Witness: No, I was on the fireman's side on the locomotive. The A unit in the rear is turned around. It faces the opposite direction from what the lead unit does.

The Court: That rear unit was not in service?

The Witness: It was in service, yes.

The Court: Was it pulling anything?

The Witness: Yes, sir.

The Court: All four of them?

The Witness: All four units pulling, yes, sir.
148 They have some kind of a relay system to lock together to pull but so far as the brake valve and the throttle and all that equipment, it is taken out and put in the lead unit so it is inoperative as far as applying the brake is concerned.

The Court: So you were in the fireman's seat?

The Witness: Yes.

The Court: Because the unit was turned around that was on the same side that the engineman was on in the lead unit?

The Witness: Yes, sir.

By Mr. Preston:

Q. You saw smoke out of this side of the train? A. Yes, sir.

Q. What color was the smoke? A. Bright yellow.

Q. When Mr. Reid gave you this signal like this (indicating) as I understand it that meant to you that Mr. Reid believed that there was a sticking brake? A. Yes, sir.

Q. You gave it back to him? A. That is right.

Q. What did that mean? A. I acknowledged his signal. That is all it meant.

Q. You acknowledged his signal? A. Acknowledged
149 his signal that I had received his signal.

Q. It was a rough stop, is that right? A. Terrifically so.

Q. Do you know whether there are many factors going into whether or not a stop is rough? A. Frankly, I couldn't answer that question unless you will be more specific.

Q. Suppose you have a train that is all stretched out, the slack is all out this way (indicating). Is it not more reasonable to expect a rough stop when that train stops than if the slack is evenly distributed throughout the train? A. Yes.

Q. Suppose you have a train that is made up with a whole lot of real heavy cars way back by the caboose loaded with coal, say, and up by the engine you have got a lot of empties. Isn't it more reasonable to expect you would have a rough stop? A. Yes.

Q. Suppose the train is going down into a dip and you have to stop just halfway up the next hill. Isn't that a factor in there that can contribute to a rough stop? A. You are talking of one thing in one sense and another thing in another sense. You are talking about run-ins and run-outs in one sense and I thought we were talking about
150 stops where brakes are applied. Run-ins and run-outs and brake stops are two entirely different things. Run-ins in hills and valleys, that is an entirely different matter from using air brakes.

Q. Suppose you have to stop on a hill? A. It is hard to tell how a train will stop.

Q. In other words, you can't predict what the stop will be? A. It depends on the terrain, whether you can predict the stop or not.

Q. And a good many other factors, isn't that right? A. It depends on what you consider other factors.

Q. What I am talking about is this: The condition of the slack, whether it is streached out or bunched up, the position of the cars. That all has a bearing on whether you are going to have a rough stop, isn't that right? A. Certainly.

Q. Aren't brakemen on freight trains trained to get ready for a stop? A. No.

Q. Don't they traditionally, when they are in the caboose and they hear the air go, don't they take hold of the grab irons and brace themselves? A. You have answered your own question, Mr. Preston. We are not trained to it. We do it through experience.

Q. Through common knowledge, isn't that correct?
151 A. Yes, but we are not trained to do it.

Q. Stops on freight trains are inclined to be rougher than stops on passenger trains, isn't that right? A. You can get a mighty rough stop on a passenger train, too.

Q. But generally speaking, am I not correct in my understanding that the stops on a freight train are rougher than stops on passenger trains— A. No, sir.

Q. With tight locked couplers? A. All things being equal, there shouldn't be any difference.

Q. Returning to the slack in between these cars on an average—I believe you said something about a foot of slack in between these cars—heavy loads? A. A passenger car weighs about 70 tons loaded and a freight car weighs about the same.

Q. They are much longer trains? A. A passenger is longer than a freight car.

Q. I said a train. A. You have a difference in equipment. You have a different type of brake on your passenger car and different type of brake on the freight car but, all things being equal, there should not be any rougher stop on a freight train than on a passenger train.

152 Q. Is that your testimony? A. That is true.

Q. A nice easy ride? A. I didn't say anything about the ride. I didn't say anything about that.

Q. You have been a conductor on passenger trains? A. For quite some time.

Q. Have you ever ridden the modern streamline trains? A. Yes, sir.

Q. On the R. F. & P.? A. Yes, sir; 35,000 miles a month.

Mr. Savage: How much?

The Witness: 35,000 a month.

By Mr. Preston:

Q. And it is your testimony, Mr. Florence, that they ride just about the same as a freight train? A. I didn't say that—

Mr. Savage: I object to counsel misquoting because he has not said a thing about the riding qualities. His testimony has to do with the braking power.

By Mr. Preston:

Q. I will limit that to the nature of the stops that are normally to be experienced in freight trains and passenger trains. Are they about the same, as far as your testimony is concerned? A. All things being equal, a freight train stop should be comparable to a passenger train stop. There shouldn't be any difference in them at all. 153

Q. By all things being equal, what do you mean? A. That is right, all brakes working, and so forth and so on. That is what I mean.

Q. Mr. Florence, I believe you said you resigned from the railroad. Is that correct? A. Yes, sir.

Q. In April, 1950? A. Yes, sir.

Q. Can you tell me the circumstances of your resignatino from the railroad? A. I had accepted steady employment and did not plan to return to railroad service in any capacity so I resigned of my own free will.

Q. Was there any dispute that you had about that time as to whether or not you were entitled to a vacation or some vacation pay was coming to you or anything of that nature involved in your decision to resign from the railroad? A. It would be rather silly for me to resign and then discuss anything. However, it was discussed about vacation after I resigned but not prior to my resignation.

Q. It was discussed? A. Yes, my vacation pay was discussed.

154 Mr. Savage: After your resignation—

Mr. Preston: Wait a minute, Mr. Savage—

The Witness: After my resignation—

Mr. Preston: I am still on cross examination.

Mr. Savage: I am sorry.

By Mr. Preston:

Q. Who did you talk to? A. Mr. Engard and Mrs. Rollins, a secretary there to the train master.

Q. What was the result of that discussion, Mr. Florence? A. What was the result of the discussion?

Q. Yes. A. What do you mean? I learned very definitely that I would not get my vacation pay.

Q. That you would not get your vacation pay? A. That is right.

Q. And you say this came after— A. After my resignation, yes, sir.

Q. After you resigned? A. Yes, sir.

Mr. Preston: I believe that completes cross examination.

Redirect Examination

By Mr. Savage:

155 Q. Mr. Florence, I believe you said that, all things being equal, you should get a smooth stop on a freight train? A. Yes, sir.

Q. And by "all things being equal", you described that as being all brakes in good condition and operating properly? A. Yes, sir.

Q. If you got the same braking application on the rear of the train as you got on the front of the train, even though the slack might be stretched, what kind of stop should you get if the brakes are in good condition? A. You should get the same stop on the rear that you get on the front. You should get a normal stop.

Q. In other words, if you have 20 pounds reduction on your engine and the cars on the head end and have the same sort of reduction of the cars on the rear, it should not make any difference how many cars you have, should it? A. No, not a bit.

Q. Or whether it is passenger or freight equipment? A. It should not.

Q. What is the required brake pressure on an R. F. & P. train. A. Freight or passenger?

Q. Freight. A. Seventy pounds.

Q. Did I understand you to say that you had a
156 duplicate set of gauges in your cab? A. Yes, sir.

Q. Were you in a position to know what air pressure you had when you left Richmond? A. Yes, sir.

Q. Was it a part of your duties to watch those gauges? A. Yes, sir.

Q. What pressure did you have when you left Richmond? A. It was a fraction less than 60 pounds.

Q. Which was 10 pounds less than the required braking pressure, is that correct? A. Yes, sir.

Q. Do you know what pressure you had at the time the reduction was made just before reaching Milford? A. With reference to the time that I saw the hot box or the smoke, is that the time?

Q. Yes; after you notified Mr. Reid that there was a hot box, what reduction did he make? A. He reduced his pressure about 20 to 21 pounds.

The Court: That would make it down to 40?

The Witness: Between 38 and 40, sir.

By Mr. Savage:

Q. Do you know approximately what pressure there was when the emergency stop came? A. It was a little over 50 pounds.

157 Q. It had built up to about that? A. Just a little over 50 pounds, yes, sir.

Q. What can you say with regard to whether or not low pressure could cause a rough or emergency stop? A. Your question again, Mr. Savage. I didn't understand.

Q. I will withdraw it. It wasn't so clear.

Will you tell us whether or not low pressure could cause a rough or emergency stop? A. Yes.

Q. Is there anything different about the operation of the brakes on a Diesel engine, this particular kind of Diesel or this very Diesel, when the air is applied from the rear? A. Well, if it should be applied from the rear, normally that is a service application—you get a service application on the engine. However, if you get the application from the rear it knocks all the motors off line. It kills the motors and they go into emergency immediately.

Q. Through the medium of what is known as— A. Some kind of switch, PCS switch—

Q. PC switch, pneumatic control—

Mr. Preston: Mr. Savage—

Mr. Savage: There is no dispute about it.

By Mr. Savage:

Q. There is a switch up there which kills the motors, you say? A. Yes, sir.

158 Q. And if you get an emergency application from the rear, it knocks that switch off, is that right? A. That switch knocks the motors off.

Q. And it kills the power? A. Absolutely.

Q. So your Diesel stops how? A. Dead; right there.

Q. With the result that the cars do what? A. They pile into it.

Q. In what way is that different from a steam engine? A. A steam engine—

The Court: Is that relevant?

Mr. Savage: I think it is, Your Honor. It is something which Mr. Preston injected into this case, training. I think it is very relevant.

Mr. Preston: I don't understand.

The Court: Do you object?

Mr. Preston: Yes, I object.

The Court: I sustain the objection. I don't want the case confused with what is on a steam engine.

By Mr. Savage:

Q. Let me put it this way. Were you, in the course of your training or instruction with the R. F. & P., ever told there was a switch which would kill the motors
159 on a Diesel? A. No, sir.

Q. Do you know whether or not that is a part of the training given brakemen and conductors? A. It is not part of the training.

Q. Or was not at the time that you left? A. No, sir.

Mr. Savage: That is all.

Recross examination.

By Mr. Preston:

Q. Mr Florence, did you ever have any training or act as an engineman or fireman at any time? A. No, sir.

Q. Your training was flagman, brakeman and eventually conductor. A. That is right.

Q. And resignation? A. Yes, sir.

Mr. Preston: I have no more questions.

Mr. Savage: Your front brakeman, however, is required to ride on the engine?

The Witness: Yes, sir.

Mr. Savage: And watch the gauges?

The Witness: Yes, sir.

Mr. Savage: That is all.

160 The Court: Mr. Florence, an emergency stop is brought about by a very rapid reduction in the air, isn't it?

The Witness: Yes, sir.

The Court: An emergency stop is necessarily an abrupt stop, isn't it?

The Witness: Yes, sir.

The Court: You don't get smooth stops when you apply the emergency lever?

The Witness: No, sir.

The Court: As I understand it, after the discovery of the smoke, the air was reduced, the train was reduced in speed and the air was reduced to 38 or 40?

The Witness: Yes, sir.

The Court: Then the reduction in the air ceased and the train started to proceed at a faster rate?

The Witness: Yes, sir.

The Court: And, at the same time, the air built up to about 50?

The Witness: Yes, sir, a little better than 50.

The Court: When the stop came which caused this jolt, did you look at the gauge again?

The Witness: Yes, sir.

The Court: What was it then?

The Witness: Zero.

The Court: In your experience, did that indicate
161 an emergency stop or does that indicate something
else?

The Witness: It indicated an emergency stop.

The Court: And that could have been caused by the conductor making an emergency stop instead of reducing the air?

The Witness: Yes, sir.

The Court: What in your opinion, caused it in the event the conductor reduced the air gradually and did not make an emergency stop?

The Witness: I have no idea what could have caused it other than that except for the fact that the pressure was low.

Mr. Savage: What was that last answer?

The Witness: Except that the pressure was low.

The Court: Then an effort to come to a normal stop, a service stop with the pressure low, would result in a reaction similar to an emergency stop?

The Witness: Not necessarily, no, sir.

The Court: Would it on any occasions?

The Witness: Yes, it would on some occasions.

The Court: Would it because the train was going downhill or uphill?

The Witness: No. It might be because if you had, for instance, a faulty triple valve anywhere in your train line, it might go into emergency with low pressure.

162 The Court: But you would have to have that?

The Witness: Yes, sir.

The Court: Were these freight cars loaded or were they unloaded?

The Witness: Some loaded, some empty, sir.

The Court: Were they closed cars or gondolas?

The Witness: Gondolas and box cars.

The Court: What is the usual reaction when a service stop is attempted with the pressure reduced to 50 pounds?

The Witness: It is generally rough.

The Court: Then with the pressure reduced, there is no way of having a smooth stop except on occasions?

The Witness: That is right.

Mr. Preston: May I ask just one question?

Was there anyone else back there in the rear facing the unit with you at the time this occurred?

The Witness: No, sir.

Mr. Preston: Nobody else?

The Witness: No, sir.

Mr. Preston: That is all I have.

Mr. Savage: As I understand your testimony, with low air pressure you may get a rough stop, you may get a smooth stop but the action of the air brake is not as positive as it would be with a 70-pound pressure, is that your testimony?

The Witness: That is right.

163 Mr. Savage: In other words, 70 pounds is required to operate those brakes efficiently?

Mr. Preston: Mr. Savage, I think that is leading too far and I object to the question.

The Court: I sustain the objection.

Mr. Savage: Do you know the reason for the rule of the R. F. & P. requiring 70 pounds pressure on freight trains?

The Witness: I don't know the reason for the rule.

Mr. Savage: There is, however, such a rule?

The Witness: Yes, sir.

Mr. Savage: I believe you did testify that if a brake valve or the conductor's valve is applied in a careful manner from the caboose, you can get a smooth stop?

The Witness: Yes, sir.

Mr. Savage: You mentioned something about triple valves. How many do you have on 112 cars?

The Witness: 112.

Mr. Savage: You mean one on each car?

The Witness: Yes.

Mr. Savage: If any one of them is defective, it might cause a very rough stop?

The Witness: Yes, sir.

Mr. Savage: Even though the air is applied carefully from the rear?

The Witness: Yes, sir.

164 Mr. Savage: Does an emergency stop or should an emergency stop, assuming you have the proper train line pressure and all brakes are working properly, be as rough as the stop you experienced at the time of Mr. Brooks' accident?

The Witness: No, sir.

Mr. Savage: In other words, it is possible to get a quick emergency stop without being that rough?

The Court: I sustain the objection.

Mr. Savage: That is all.

The Court: You are excused, Mr. Florence.

(Witness excused.)

The Court: We will take a five-minute recess.

(A short recess was thereupon taken. The following then occurred:)

165 Mr. Savage: By agreement we would like to offer in evidence an annuity table entitled Rates for Life Annuities with no Payment After the Death of Annuitant issued by the Prudential Insurance Company of America, with particular reference to the cost of purchasing an annuity to buy a man a monthly sum of $10 per month at age 30.

This shows that it would cost a man who wanted to buy $10 per month for the period of his life $3,150.

Is that a fair statement, Mr. Preston?

Mr. Preston: That is what the table shows. There is no question about it, Mr. Savage.

Mr. Savage: We would like to offer that in evidence.

The Deputy Clerk: Plaintiff's Exhibit No. 2.

(The document was marked Plaintiff's Exhibit No. 2 and received in evidence.)

Mr. Savage: That is the Plaintiff's case, Your Honor.

Mr. Preston: May we come to the bench, if Your Honor please?

The Court: Do you want the jury excused?

Mr. Preston: I don't think it will take long.

(Thereupon, counsel approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

Mr. Preston: Mr. Savage, paragraph (d), Item 9 of your complaint, says in the alternative said accident was
166 caused by the conductor of the defendant in that he

applied said air brakes in a careless and negligent manner.

I believe Mr. Brooks himself on the stand testified he applied them in the regular and normal manner.

Mr. Savage: As far as he could see.

Mr. Preston: Therefore I make a motion as to paragraph (d) that there be a directed verdict in the case in relation to this particular issue.

The Court: You don't have directed verdicts as to various allegations of negligence. If certain ones aren't established, of course they are not submitted to the jury.

Mr. Preston: Could I ask, then, that this not be submitted to the jury?

The Court: That can't be determined until the end of the case. It sometimes happens the defendant helps the plaintiff's case.

Mr. Preston: Well, I make a motion, in any event.

The Court: Do you oppose it?

Mr. Savage: Yes, sir.

The Court: The motion is overruled.

(Thereupon, counsel resumed their places at the trial table, and the following proceedings were had in open court.)

Mr. Preston: Call Mr. Reid, please.

The Court: Don't forget those doctors.

167 Mr. Preston: Yes, after lunch, if Your Honor please. The doctors, you say?

The Court: Yes.

Mr. Preston: After lunch.

Thereupon, **C. I. Reid** was called as a witness by the defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

Q. Will you give the Court and jury your name and address? A. C. I. Reid, Unionville, Virginia.

Q. By whom are you employed, Mr. Reid, and in what capacity? A. R. F. & P. Railroad, as engineer.

Q. Are you also assistant foreman of engineers? A. Not at this time.

Q. Were you on December 12, 1949? A. Yes, sir.

Q. Were you aboard Extra 1103 of the R. F. & P. Company from Richmond on December 12, 1949? A. Yes, sir.

Q. Was Mr. Thomas Brooks the flagman on the train? A. Yes, sir, I believe he was.

168 Q. At the time you left Richmond, was it reported to you that there had been a brake inspection of this train before its departure? A. Yes, sir.

Q. What was that report? A. I beg your pardon?

Q. Was the report that the brakes were in order, or not in order? A. Reported the brakes——

Mr. Savage: Well, now.

The Court: When there is an objection, you have to stop until I rule on it, Mr. Reid.

Do you object?

Mr. Savage: Yes.

The Court: Sustained.

By Mr. Preston:

Q. What was that report, Mr. Reid?

Mr. Savage: Objected to.

The Court: Sustained. That is hearsay.

By Mr. Preston:

Q. What was your duty on that train that day, Mr. Reid? A. To instruct the engineer in the proper operation of the Diesel.

169 Q. Who was the engineer on that train assigned on the sheet? A. Mr. W. M. Bowie.

Q. At that time, during that run, were you actually operating the engines? A. Yes, sir.

Q. From the engineer's position? A. Yes, sir.

Q. And in so doing, were you instructing Mr. Bowie? A. Yes, sir.

Q. As this train proceeded north, did you make any manipulation of the brakes in demonstrating to Mr. Bowie the proper method, the approved method of operating the train? A. Yes, sir.

Q. Did the brakes function properly when you did that? A. Yes, sir.

Q. Was it done more than once? A. Yes, sir.

Q. Can you approximate how many times? A. Before the accident?

Q. Yes, sir. A. Three times. Four times. I beg your pardon.

Q. Did there come a time during your run when you saw smoke coming out from under the cars? A. Yes.

Q. Did you see the smoke, or was it called to your
170 attention? A. No, the fireman called my attention
to the smoke.

Q. What was the fireman's name? A. R. L. Watson.

Q. Where was he sitting? A. On the left side of the Diesel cab, in the fireman's position.

Q. And where were you sitting, Mr. Reid? A. The right side, in the engineer's position.

Q. When you saw the smoke, what did you do, Mr. Reid? A. I made a——

Mr. Savage: He didn't say he saw it. He said his attention was called to it.

By Mr. Preston:

Q. Did you see smoke coming out of the train on your side? A. Yes, sir.

Q. Now what did you do, Mr. Reid? A. I made a service application of the brakes.

Q. And about what was the reduction of air that you used? A. Approximately 15 pounds.

Q. What was the air pressure when you commenced to make that reduction? A. 80 pounds, as shown by the gauge of the locomotive.

171 Q. Is there a gauge in front of you? A. Yes, sir.

Q. And making that 15 pound reduction, I assume it went down to about 65 pounds? A. That is right.

Q. Why did you do this, Mr. Reid? A. As I thought we had what is known as a stuck brake, and that is one method of releasing a stuck brake without stopping the train.

Q. Will you tell us how that can be done? A. By making a full service application, and then releasing the brakes.

Q. Does that often cure sticking brakes? A. Very often, yes, sir.

Q. What was the reason that you thought this was a sticking brake? A. As the fireman had seen the smoke on the left side, in a left-hand curve, I waited until I got into a right-hand curve, and I could see the smoke on my side of the train, on the right side of the train, and seeing smoke on both sides of the train we figured, or, I figured it was a stuck brake. Usually a hot box would only show up on one side of the train.

Q. Do sticking brakes usually show up on both sides of the train? A. Yes, sir, show on both sides.

172 Q. Did the train brakes act normally when you made your service reduction? A. I don't understand it.

Q. Was the operation of the brakes when you made your service reduction normal? A. Yes, sir.

Q. About where was the train along its route at that time? A. At the time of applying the brakes?

Q. At the time of applying the brakes. A. Just south of the 37 mile post.

Q. In other words, you travelled about 37 miles from Richmond? A. Yes, sir.

Q. Was there a crossroad shortly after that to be passed? A. Yes, sir.

Q. What did you do as to the crossroad? A. Well, I blew the whistle for the road crossing. That is, the locomotive whistle.

Q. Was that after the brakes were released? A. Yes, sir.

Q. Shortly after that did anything unusual occur, Mr. Reid? A. Yes, the brakes went into emergency.

173 Q. And what happened? A. Well, that caused what is known as a car cutoff switch operation, and it drops your locomotive throttle from full throttle down to idle.

The Court: Down to what?

The Witness: Dropped the throttle from full throttle down to idle position.

The Court: Idle? I see.

The Witness: In that you lose all the power from your traction motor, whenever you get an emergency application of the brakes and the PC light, as we call it, operates.

Mr. Savage: We can't hear you.

The Witness: I say whenever we get an emergency application on the brakes your PC light, as we call it, will operate. That is Power Cutoff switch.

By Mr. Preston:

Q. Did that switch operate in this case, Mr. Preston? A. Yes, sir.

Q. Did the train come to a stop? A. Yes, sir.

Q. Was it a rough stop? A. Very rough, yes, sir.

Q. At the time when you passed this crossroad which you spoke of, or about that time, did you look at the speedometer on the train? A. Yes, sir.

174 Q. What did that register? A. 40 miles an hour.

Q. At the time when the brakes went into emergency, what was the air pressure on the brakes? A. On my gauge it was 80 pounds.

Q. And what did that pressure go down to before this incident was over? A. Beg pardon?

Q. What was the lowest pressure that was registered on the gauge during this time, if you recall? A. Before the emergency?

Q. After the emergency. A. Afterward it went to zero.

Q. Why was that, Mr. Reid? A. Because the brakes had gone into emergency.

Q. Do you know how those brakes were put into emergency? A. No, sir.

Q. Did you do it? A. No, sir.

Q. Well, now, is there any other method of applying the brakes on a train, other than on the engine? A. Yes, sir.

Q. How is that done? A. By the conductor's valve, or emergency valve.

175 Q. And where is that located? A. On either end of the caboose car.

Q. Is that on all trains? A. Yes, sir.

Q. And why is that there? A. For emergency purposes, and to stop the train.

Q. You said to stop the train? A. Yes, sir.

Q. Can that valve be used just to slow the train down? A. No, sir.

Q. It is either the train is going or it is stopping, is that right? A. That is right, yes, sir.

Q. But this air valve up in the engine, is this valve up in the engine like the valve back in the caboose? A. No, sir.

Q. Will you describe briefly what this valve looks like, and what it does? A. Well, the automatic brake valve——

Q. First, Mr. Reid, will you confine yourself to the automatic valve? A. Automatic valve, yes, sir. The automatic valve is a round casing, I would call it, or stand, and contains a rotary valve with a long handle setting out on it.

The Court: Are you any good as an artist?

176 The Witness: No, sir.

The Court: All right. Go ahead.

The Witness: I may be able to give a drawing.

The Court: Then go to the blackboard and show him.

The Witness: This is the handle, here. This would be the body of the brake valve. There is a stem comes down through here. This handle is coupled to it. There is a part up around here that is notched for full release, running, first service, lap service, and emergency.

The Court: You might show what is on the rear. You said they were different.

By Mr. Preston:

Q. What does the conductor's valve on the rear look like, if you can draw a picture of it? A. This would be the place on the rear here, with a valve up here, like this, and a handle here. I turned that around this way. That would be like that, and would be set up like that. By pulling this valve back this way, or either way, I think it would work to open the train pipe to the atmosphere, and it applies the brakes.

The Court: Now, it doesn't have any different kind of application?

The Witness: No, sir, just the one.

The Court: Just the one?

The Witness: Yes, sir.

177 The Court: What does that do?

The Witness: That applies the brakes from the rear.

The Court: Is it an emergency stop?

The Witness: I would say that it would be an emergency stop.

The Court: All right. He can't have a service stop from the rear?

The Witness: No, sir.

By Mr. Preston:

Q. I take it there is a vast difference between the operation and use and application of the valve that the conductor has back of the caboose and the valve that the engineman has in the locomotive? A. Yes, sir.

Q. How did you know that the brakes went into emergency? A. By the fact that the brake pipe pressure of the locomotive dropped to zero, and this power cutoff switch light operated, that is, the light lit up.

The Court: The cutoff switch means that the power is cut off?

The Witness: Yes, sir.

The Court: Completely?

The Witness: Yes, sir.

By Mr. Preston:

Q. After that what did you do so far as the throttle
178 is concerned, Mr. Reid? A. I closed the throttle and
released my locomotive brakes enough to keep from sliding the wheels of the locomotive and lapping the brake valve.

Q. By lapping the brake valve, what did you mean? A. The automatic brake valve, put in position with all points of the rotary valve.

Q. After doing that, can the pumps of the locomotive restore pressure to the braking system? A. They would not while the brake valves are on lap.

Q. Go ahead. A. We have to lap the brake valve and close the throttle to idle in order to get the PC light out.

Q. I take it, then, when the power cutoff switch light is on, you haven't even got the power to pump up air in the braking system, is that correct? A. No, sir, you don't.

Q. Did it come to your attention that Flagman Brooks had been hurt in this accident? A. Not until I arrived at the Potomac Yards.

Q. You were not notified it had happened? A. No.

Q. Was the car cut out at Milford? A. Yes, sir.

Q. Did you use the locomotive and its braking sys-
179 tem to handle that movement? A. Yes, sir.

Q. Did the train proceed on to Potomac Yards? A. Yes, sir.

Q. That day? A. Yes, sir.

Q. In the normal fashion? A. Yes, sir.

Q. Was there any improper functioning of the brakes on the locomotive or the train during the remainder of that run? A. No, sir.

Q. Mr. Reid, how many years have you been employed by the railroad? A. About thirty-eight.

Q. Has that been continuous employment? A. Yes, sir.

Q. Have you always been in the mechanical division of the engineering department? A. Yes, sir.

Q. How long have you had an engineer's rating? A. Since 1923.

Q. Twenty-seven years, is that correct? A. I believe that is right.

180 Q. And will you describe briefly the duties of the assistant locomotive foreman? A. It is to ride the different locomotives, and report their condition to the proper authority, and to instruct both firemen and engineers in the proper performance of their duty.

Q. The locomotive you were riding was, I believe, Extra 1103? A. Yes, sir.

Q. Was that a new one or old one? A. They were fairly new, yes, sir.

Q. Did they have new, modern equipment on them? A. Yes, sir.

Q. As far as brakes were concerned? A. Yes, sir.

Q. Mr. Reid, were you injured in this stop? A. No, sir.

Q. Was anybody in the locomotive injured? A. No, sir.

Q. Was any equipment in the locomotive injured? A. No, sir.

Q. Was there any damage to the train? A. No, sir.

Q. In some of these very rough stops as you describe them, is there damage to the train? A. Sometimes, yes, sir.

Mr. Preston: I believe that completes the direct examination.

181 Cross Examination

By Mr. Savage:

Q. You don't mean to infer you can't get a very rough stop without damage, do you? A. No, I don't mean that.

Q. No, I didn't think so. As a matter of fact, you did get such a stop on this particular occasion? A. We got a rough stop, yes, sir.

Q. A very rough stop? A. Yes, sir.

Q. So much so you felt it up at the engine, 112 cars away from the caboose? A. Yes, sir.

Q. And if you felt it in your engine, it would be much rougher on the rear, wouldn't it? A. I wouldn't say that.

Q. Now, Mr. Reid, you have had thirty-eight years' experience, and you know, as a practical man, when you get a rough stop at the engine, you get a much rougher stop at the caboose, don't you? A. No, sir. We very often get a rough stop on the engine, and ask the crew about it later, and they didn't get it on the rear.

182 Q. But, in most cases, or, as a general rule, when you feel it at the engine, you hear about it from the caboose, don't you? A. Very often.

Q. Yes. Your job was to instruct the engineer in the proper operation of this engine? A. Yes, sir.

Q. Also the fireman? A. Yes, sir.

Q. Were you supposed to give the front brakeman any instructions? A. No, sir.

Q. Brakemen do apply the air, though, don't they, from the caboose if necessary. A. I believe so.

Q. And on this particular type of Diesel with a PC switch, if the air is applied from the rear, it will kill your motor, is that true? A. Yes, sir.

Q. Which would be felt in a much rougher stop than you would ordinarily get, is that true? A. Well, not always.

Q. Than you would ordinarily get? A. Ordinarily, yes.

Q. And, notwithstanding that, brakemen aren't told of that fact, are they? A. I beg your pardon?

183 Mr. Savage: Read it to him.

(The pending question was read by the reporter.)

The Witness: I don't know what the brakemen are told.

Mr. Preston: I object to the question of Mr. Savage. I am not sure Mr. Reid knows what the brakemen are told.

The Court: If he knows, he may answer.

The Witness: I don't know that.

By Mr. Savage:

Q. With your thirty-eight years of experience, you wouldn't know that? A. No, sir.

Q. You would know there is a PC switch on a Diesel? A. Yes, sir.

Q. You would be charged with that duty? A. Yes, sir.

Q. Of knowing that? A. Yes, sir.

Q. As a matter of fact, you tell that to the engineers and instruct them in the use of it? A. Yes, sir.

Q. That is a comparatively new thing, isn't it? A. Yes, sir.

Q. That is, the PC switch? A. Yes, sir.

184 Q. I understood you to say you had smoke on both sides. A. Yes, sir.

Q. Which could either have been caused by sticking brakes, or a hot box? A. Yes.

Q. And it was caused by a hot box on this particular occasion? A. Yes.

Q. And did you see the hot box when the car was set off? A. No.

Q. But in any event, the smoke was sufficient to come out of both sides, not only on the side where the hot box existed, but it was so extensive it came out on the other side, as well? A. Evidently.

Q. So that it could be seen by you as well as somebody on the other side of that car? A. That is what took place, yes, sir.

Q. All right. Is there a duplicate set of gauges on the rear unit of this four-unit Diesel? A. I don't remember if we had a A-unit on the rear or not.

Q. If you did have a A-unit? A. If we did have one, they would have a gauge on the rear unit.

185 Q. So that somebody in the rear unit could see what reduction was made in the air, and what air

pressure you had, just as well as you could? A. Yes, sir.

Q. Mr. Florence was in that rear unit? A. No, sir, not to my knowledge.

Q. What? A. Mr. Florence was in the front cab, as well as I remember now.

Q. He was a member of the crew, engine crew, at that time? A. Yes, sir.

Q. Front brakeman? A. Yes, sir.

Q. And Mr. Florence would be, then, in a position to see this gauge? A. If he was standing behind the engineer.

Q. You are not sure whether he was? A. No, sir.

Q. What is the difference between the type of smoke coming from a sticking brake and the kind coming from a hot box A. I wouldn't know the difference, Mr. Savage.

Q. Oh, come, Mr. Reid, you have been an employee for thirty-eight years. You know there is a difference. A. The
smoke I saw was a light grey, like a whitish smoke.
186 Q. Yes. A. It could have been coming from either
a hot box or stuck brakes.

Q. What color do you customarily get from a hot box? A. A hot box usually shows a dark smoke, and fire in it.

Q. Well, in any event, you found out later you were mistaken in your judgment about it being a sticking brake? A. Yes, sir.

Q. You have rules, do you not, requiring you to stop when you have a hot box? A. When we have a hot box, yes, we have that rule.

Q. Why? What is the reason for that rule? A. To cool the hot box, to examine it, cool it.

Q. And what else? A. And set it off, if necessary.

Q. And it was necessary to set it off this particular time? A. They could have packed it.

Q. You don't know, you didn't see it, did you? A. I didn't say what?

Q. I say you don't know whether it could have been used or packed, because you didn't go back to see the hot box. A. No, I don't know that. No, sir.

187 Q. Then, don't you wish to say you don't know whether it could have been used or not? A. I don't know.

Q. All right. That is what I am trying to get, but if it was cherry red, if the axle is cherry red, and the waste actually burning, it would have been unsafe to use it, wouldn't it? A. Yes, sir.

Q. You are quite sure you had 80 pounds of pressure when you left Richmond? A. Yes, sir.

Q. How much pressure is required? A. Eighty pounds.

Q. Are you sure of that? A. Yes, sir.

Q. Isn't there a rule of the R. F. & P. you only require 70 pounds of pressure? A. No, sir.

Q. Since when do you require 80 pounds? A. We have required 80 pounds since shortly after we received the Diesels.

Q. That was a new thing, then? A. Yes, sir.

Q. And the train crew were not instructed 80 pounds was required. A. I don't know what they were instructed.

188 Q. Let us put it this way. You were familiar with the new Diesels? A. Fairly so. I am no expert, though.

Q. You were instructing the engineers in their operation. I assume you were fairly familiar, in order to be able to do that, is that right? A. That is right, yes, sir.

Q. You knew it had a PC switch, which was a new thing? A. Yes.

Q. And you knew an order had just gone out requiring 80 pounds of pressure, is that right? A. Yes.

Q. And nevertheless, you were not required to tell the brakemen about that, were you? A. No, sir.

Q. You are quite sure when you got to that crossing you were just moving at 40 miles an hour? A. According to the speedometer.

Q. As a matter of fact, Mr. Reid, you would get a rougher stop moving at 40 miles an hour if the air went into emergency than you would get if you were moving 60, wouldn't you? A. Yes.

Q. Right. This air valve is calibrated so that you could
make—so that you know what reduction you are
189 making, is that correct? A. Yes, sir.

Q. If you want to make a 5-pound reduction, you can do that? A. Yes.

Q. If you want to make a 10-pound reduction, you can do that? A. Yes, sir.

Q. Now, the conductor's valve in the caboose is not calibrated, is it? A. No, sir.

Q. But it isn't necessary to open it all at once, is it? A. I am not familiar enough with that to say yes or no.

Q. Are you familiar with a spigot in an ordinary water faucet in a house? A. Yes, sir.

Q. You can operate the conductor's valve in pretty much the same way as you can operate the faucet, can't you? A. I don't know.

Q. We are not trying to confuse you. We just want a little information. We are relying on your thirty-eight years of experience to give it to us.

The Court: He has been in the engine. He hasn't been in the caboose.

By Mr. Savage:

190 Q. You are a conductor now, aren't you? A. I am an engineer.

Q. You are an engineer now? A. Yes, sir.

Q. And prior to becoming an engineer, you were a fireman? A. Yes, sir.

Q. And the caboose, the valve in the caboose is a part of the train line equipment isn't it? A. Yes, sir.

Q. And as an engineer, you are required to know something about the air equipment, aren't you, and you would be required to know your compressors would have sufficient force to pump up the pressure required on the train line, is that right? A. Yes, sir.

Q. And if any part of the train line was not operating efficiently, or if your triple valve was not working properly, or if you had leakage, you would not get the required pressure, would you? A. If you had leakage, you would not get the proper pressure.

Q. And if, for instance, the conductor's valve on the caboose was leaking, you wouldn't get proper pressure, would you? A. No.

191 Q. So that you really have to know something about that to know your job, don't you? A. Yes, sir.

Q. You have seen these conductor's valves many times, haven't you? A. I have.

Q. And you drew a picture of it? A. Yes.

Q. And you know it is not necessary to open it wide all at once, is it? A. I don't know the instructions the trainmen have on that.

Q. I didn't ask you that, Mr. Reid. I asked you whether or not you knew it wasn't necessary to open it wide all at once. A. I don't know that.

Q. Have you ever seen one? A. Oh, yes.

Q. How often? A. Oh, well, I couldn't say how often.

Q. Didn't you feel it was necessary, since this was a part of the air brake equipment, directly controlled and operated by the engine, as you have admitted, to familiarize yourself with the operation of the conductor's valve in
192 the caboose? A. I never have occasion to use it.
I didn't ask you that question. A. No.

Q. You didn't feel it was necessary to familiarize yourself with that at all? A. No, sir.

Q. Well, now, even if you weren't a man of thirty-eight years of experience, having seen that valve, and being reasonably familiar with the mechanical appliances, as you would have to be, you would know it is possible just to crack that valve slightly, wouldn't you? A. I should imagine so. I don't know that.

Q. And if you did crack the valve slightly, you would not get an emergency application, would you? A. They say it will.

Q. Don't you know? A. No, sir, I don't know.

Q. Your testimony, then, is that a brakeman who is familiar with that valve would know more about it than you would? A. Yes, sir.

Q. So that when you told Mr. Preston you could only get an emergency application by the use of the valve in the rear, you were not quite sure of that, you didn't know? A. Yes, I knew that it was an emergency valve.

193 Q. Of course it is. A. That is the name of it.

Q. But I think you misunderstood what he really meant. There is a distinction between an emergency valve, and an emergency application.

Mr. Preston: I believe you are testifying.

The Court: This is cross-examination.

Mr. Savage: This is proper cross-examination.

The Court: This is cross-examination. I overrule the objection.

You may answer. If you don't recall the question, he may repeat it.

Mr. Savage: I will repeat it.

By Mr. Savage:

Q. There is a difference, isn't there, between an emergency valve and an emergency application of the brake, isn't there? A. Yes, sir.

Q. I thought you meant that. So that the valve on the rear you might operate is an emergency, but that doesn't necessarily mean you would have to get an emergency application of the brakes, does it? A. Yes, if you operate the emergency, you are bound to get an emergency application of the brakes.

194 Q. If you just crack it, or open it gradually, it doesn't necessarily mean you would get an emergency? A. I haven't had that experience, operating that valve. I couldn't answer that.

Q. That isn't your answer to Mr. Preston's question, that you don't know. A. In answer to Mr. Preston's question, that I don't know.

The Court: I don't think he understands.

The Witness: No, I don't understand.

By Mr. Savage:

Q. Mr. Preston asked you whether or not you had to get an emergency application of the brakes by operation of the valve on the rear. A. Yes, sir.

Q. Isn't what you meant that this was an emergency valve, but you did not necessarily have to get an emergency application by the use of that valve? A. That is not what I meant. I meant when you applied that brake from the rear, you would get the emergency application.

Q. But you say that not knowing whether it is possible to open it gradually or not? A. Even if you opened it gradually, I understand you would get an emergency application.

195 Q. Tell us why. A. Well, I don't know why. It has no graduations on it, no way to graduate the amount of air you exhaust to the atmosphere.

Q. You have a gauge back there, don't you? A. The conductor's gauge.

Q. You have a gauge back in the caboose, don't you? A. I believe they do on that.

Q. Oh, Mr. Reid, don't you know? A. Mr. Savage, may I answer this way?

Q. Certainly. A. The conductor would have to be out on the rear platform or the head platform, either one, you see, and the gauge is located inside the caboose, near the cupola.

Q. But you do have a gauge in there, don't you? A. Yes, sir.

Q. And it shows you train line pressure? A. Yes, sir.

Q. And it shows the amount of reduction? A. Yes, it does.

Q. And if somebody is standing there in the center of the caboose, they could see that gauge? A. Yes, sir.

Q. It is a large affair, isn't it. A. Yes, sir.

196 Q. Suppose that gauge showed a 15-pound reduction as a result of the application of the reduction of air from the emergency valve. What type of stop would you get, what kind of action would you get? A. From the use of the emergency valve, you say?

Q. I will repeat the question. Suppose the emergency valve is used on the caboose, and the gauge shows a 15-pound air reduction. What effect would that have on the train? A. I wouldn't know.

Q. What effect would it have if you made a 15-pound reduction? A. It would slow the train down.

Q. Gradually? A. Yes.

Q. Why would it be any different from the rear? A. I can't answer that. I don't know.

Q. The R. F. & P. doesn't require you to be familiar with the conductor's valve, does it? A. No, sir. That is the conductor's business on the rear, and mine is on the head end.

Q. They don't require you to be familiar with what kind of stop you can get from the rear? A. Not me, no, sir.

Mr. Savage: Thank you very much, Mr. Reid.

The Court: Just a minute. Let me ask one question.

197 Mr. Preston: Would you just wait a minute, Mr. Reid. May I have the Court's indulgence for a moment?

I have no redirect.

The Court: Stand down, Mr. Reid, and take a seat in the courtroom.

(Witness excused.)

Mr. Preston: Will you call Mr. Watson, please.

Thereupon **Russell LeRoy Watson**, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

Q. Mr. Watson, give me your full name and address. A. My name is Russell LeRoy Watson. My address is Route 4, Box 319, Cushman, Virginia.

Q. Keep your voice up, please, so I can hear and the jury can hear. That is all right. I heard that.

By whom are you employed, and in what capacity? A. I am employed by the Richmond, Fredericksburg & Potomac Railroad Company as locomotive fireman.

Q. Were you fireman on extra 1103, a freight train from Richmond to Potomac Yards on December 12, 1949? A. I was.

Q. Were you riding in the locomotive that day? A. I was.

198 Q. Where was your position? A. Well. the fireman's seat is on the left-hand side of the cab of the locomotive.

Q. Was Mr. Reid, the assistant foreman of engines, riding in the cab with you at that time? A. He was.

Q. And Mr. Bowie, the engineer? A. He was.

Q. Was Mr. Florence, the brakeman, riding in the unit with you? A. I don't remember.

Q. Mr. Watson, as the train went north from Richmond, did there come a time when you saw smoke on your side of the train? A. There did.

Q. About when was that? A. Well, as we rounded the curve to the left, and the train was crossing the river, I looked back and saw smoke coming from the train on the left-hand side, on the west side.

Q. West side, going north? A. Yes.

Q. What did you do? A. I told Mr. Reid, "There is something smoking on this train about 40 or 50 cars from the engine on my side."

Q. Then what did you do? A. That is all.

199 Q. Did you have any further duties to perform in relation to that smoke? A. No, sir.

Q. Did you have a set of braking handles over there on the fireman's side with you? A. No, sir.

Q. Do you have a throttle? A. No, sir.

Q. Do you have any control over the train at all? A. No, sir, not in the cab.

Q. After you reported this smoke to Mr. Reid, that discharged your duty in that matter, is that correct? A. I would say so.

Q. After you reported the smoke, what did Mr. Reid do? A. He put the brake on.

Q. And then what did he do? A. As far as I know he released them.

The Court: What?

The Witness: As far as I know he released the brake.

The Court: Released it?

By Mr. Preston:

Q. Then, following that, did anything unusual happen? A. Well, soon after that the PC light came on, which took the power away from the engine and the train stopped.

Q. Did the brakes go into emergency? A. As far
200 as I know, they did.

Q. was it a rough stop? A. I would say it was.

Q. Did you get injured? A. No, sir.

Q. Any part of your equipment get injured that you know of? A. Not that I know of.

Q. Did you have any duties after that as to handling the brakes or the throttle of the train? A. No, sir. I have no duties as to handling the brakes or throttle of the train.

Mr. Preston: I think that completes the direct examination.

Cross-Examination

By Mr. Savage:

Q. Mr. Watson, did you have any gauge in your cab? A. Not on my side, no gauge on myside. I only have a heater switch and a windshield wiper switch on the left side.

Q. You don't know whether Mr. Florence was there or not? A. I don't remember whether he was or not.

Q. You are not sure one way or the other? A. No, sir.

201 Q. If there was an A-unit on there, that would have gauges in it, wouldn't it? A. An A-unit has all the gauges on the right-hand side.

Q. Forty or 50 cars means what distance in feet? A. Well, I wouldn't be able to say that. Some cars are, I would say, about 40 feet, or a little more. Some may be as high as 70 feet. I wouldn't be able to say that.

Q. It would be an average of around 50 feet, just approximately, is that right? A. I reckon so, approximately.

Q. So that 40 or 50 cars back would be around a half mile back, approximately? A. Well, maybe, or it may not be quite that far.

Q. I say approximately. Did you know whether that smoke you saw was a sticking brake or a hot box? A. I didn't know what it was. I couldn't tell.

Q. Why did you notify Mr. Reid that you saw that? A. Well, I would say it was my duty to notify him that I saw it.

Q. The rules of the R. F. P. require that, don't they? A. I don't know the rule that would cover it, but I would say they do.

Q. And do you know why?

Maybe I can help you. Would it be safe to operate a train with a hot box? A. I would say not.

202 Q. And a half mile away, or something like that, it would be awfully hard to tell whether you had a hot box or a sticking brake, wouldn't it? A. It would.

Mr. Preston: I have no redirect.

The Court: Stand down. Take a seat in the courtroom.

(Witness excused.)

Mr. Preston: Call Mr. Cunningham, please.

Thereupon **Samuel D. Cunningham**, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

Q. Mr. Cunningham, will you give me your full name and address, please? A. Samuel D. Cunningham, 2707 Lafayette Avenue, Richmond 28, Virginia.

Q. By whom are you employed, Mr. Cunningham, and in what capacity? A. R. F. & P. Railroad, present capacity as a brakeman.

The Court: What is that?

The Witness: Brakeman.

The Court: Brakeman?

The Witness: Yes, sir.

203 By Mr. Preston:

Q. Are you qualified to act as conductor? A. I am.

Q. Have you acted as conductor on many trains? A. I have, sir.

Q. Both freight and passenger? A. Yes, sir.

Q. Were you riding extra 1103 of the R. F. & P. north from Richmond to Potomac Yards on December 12, 1949? A. I was.

Q. Where were you riding? A. In the caboose, on the rear of the train.

Q. With Mr. Thomas Brooks? A. Yes, sir.

Q. As you were riding, did there come a time when you and Mr. Brooks were up in the cupola? A. Yes, sir.

Q. Which side of the cupola were you sitting on? A. The east side.

Q. East side. Let me see. That is the right-had side going north? A. Yes, sir.

Q. Is that correct? A. That is right.

Q. Mr. Brooks, was he up there in the cupola with
204 you? A. On the west side.

Q. He was on the left-hand side? A. Yes, sir.

Q. Is that correct? Did there come a time when Mr. Brooks reported to you that he saw some smoke? A. Yes, sir.

Q. Did you see the smoke, also? A. I did.

Q. From your position at the rear of the train, could you determine whether the smoke was coming out on both sides? A. I could not. I saw it from the west side only.

Q. From the side you were sitting on only? A. No, sir, from Mr. Brooks' side.

Q. Could you determine about how far up the train this car was? A. It appeared to be somewhere near the center.

Q. Somewhere near the center. How many cars in this train, Mr. Cunningham? A. One hundred and eleven cars.

Q. What, if anything, did you do after you saw the smoke? A. I started to put the air down to stop the train, but—

Q. Could you do that from your post up in the cupola? A. I can, but as a rule—

Mr. Savage: We can't hear you. Do you mind
205 talking a little bit louder?

The Witness: I can, but as a rule, I usually go to the rear end of the caboose and use the valve there.

By Mr. Preston:

Q. In this instance, did you go to the rear end of the caboose and use the valve there? A. I started. About that time the engine man applied the brakes. I thought he was going to stop, but he made a service application and released the brakes.

Q. Now, how could you tell that, Mr. Cunningham? You were pretty near a mile away. What signal or indication would you have that the brakes were going on, and then, as you say, they were released? How do you know that? A. Well, there is a gauge in the cab that carries the air pressure. If you are watching that, the air gradually goes down, but also, you can tell by the movement of the train. You can feel the brakes rubbing the wheels.

Q. Can you hear them? A. Yes, sir.

Q. You can? A. Yes, sir.

Q. Is there any, for instance, escape of air you can hear when the engine man applies the brakes? A. Not on the rear, but you do hear the brakes release through the release valve.

206 Q. Wait a minute. I am just talking about the application of the brakes. Could you feel the train slow down? A. Yes, sir.

Q. Was that relatively rough or relatively smooth? A. Smooth.

Q. Was this a service application of the brakes? A. It was.

Q. And about how many pounds reduction in air, if you know, was occasioned by this application of the brakes, this service application? A. Well, I don't know.

Q. Then I take it you were not looking at the air gauge? A. That is right.

Q. Then, when the brakes released, I believe you testified the brakes did release, how did you know that happened? A. Well, I could tell by the movement of the train that the wheels were running free from the brake shoes.

Q. Was there a different sound? A. That is right.

Q. Did the train pick up speed? A. Well, I didn't notice it right away, but later on I did.

Q. Was there a noticeable increase in speed? A. Some.

Q. Do you have a speedometer back there in the ca-
207 boose with you? A. No, sir, I have not.

Q. I take it you can just feel it? A. Yes, sir.

Q. After this commencement of the picking up speed again, then what did you do, Mr. Cunningham. A. I applied the brakes from the rear end of the cab.

Q. Now, does that mean that you went out on the back platform if the caboose? A. Yes, sir.

Q. What position did you take when you got out there on the caboose, if you recall? A. Well, I was standing with my back to the rear end of the cab wall, holding onto the ladder that leads to the top of the cab and applying the air with my right hand with the valve back there for the purpose.

Q. Do you know where Mr. Brooks was at that time? A. Mr. Brooks was inside the cab.

Q. Well, what position inside the cab was he in when you went out to the rear platform? A. The last time I saw Mr. Brooks, he was standing holding onto the grab irons that led to the cupola, which is in the center of the cab.

Q. Ready for the stop, is that correct? A. Yes, sir.

208 Q. Had you told him before you went out on the rear platform that you were going to stop the train? A. Yes, sir.

Q. Now, you went out there and braced yourself.

Mr. Savage: He didn't say anything about bracing himself.

Mr. Preston: His back is up against the—well, he went out there.

The Court: Back to the rear, and one hand on the ladder.

By Mr. Preston:

Q. Backed up against the wall of the caboose there, and you took hold of the valve. How do you open that valve, Mr. Cunningham? A. I opened it gradually for some little distance, and then I opened it all the way.

Q. Now, you say gradually. Is there a phrase, Mr. Cunningham, among railroaders, such as cracking the valve? A. It is.

Q. Did you crack the valve first. A. That is right.

Q. As the phrase is normally used. A. Yes, sir.

Q. And then opened it all the way? A. Gradually.

Q. Gradually? About how long would that process take, can you tell me? A. I would say a minute and a half
209 in that position.

Q. That long? A. Yes, sir.

Q. Then, what was the result of that, Mr. Cunningham? A. Well, the train finally came to a stop.

Q. Was that a rough stop? A. It was.

Q. Did the brake go into emergency? A. I did not know.

Q. I can't hear you, sir. A. I did not know whether that did or not.

Q. Was it a sudden stop? A. Well, I would say yes.

Q. Was it an abrupt stop, a rough stop? A. A rough stop.

Mr. Savage: He said that.

By Mr. Preston:

Q. After that, did you go in the caboose? A. I did.

Q. And did you see Mr. Brooks in there? A. Yes, sir.

Q. Where was he? A. He was down on the floor, getting up, rather. He had been knocked down.

210 Q. Had you been hurt? A. No, sir.

Q. Following that, Mr. Cunningham, I take it the train was at a stop? A. Yes, sir.

Q. Then what happened? What took place in the caboose after the train came to a stop? A. Well, I asked him if he was hurt, and he was complaining some, but assumed his duties as a flagman, took the flag and went back to protect the rear of the train. I went forward to take care of the trouble.

Q. Then, when you went forward, what did you see? A. I found a hot box.

Q. And was it smoking? A. Yes, sir, it was on fire.

Q. The waste was on fire? A. That is right.

Q. How hot was that journal box, would you say? A. I don't have any idea.

Q. Was it cherry red? A. Well, in daylight it isn't as noticeable as it would be at night.

Q. It was a real hot box, though? A. Yes, sir, it was.

Q. Then, what did you do following that? A. I
211 made a cut there and moved the head of the train, or signaled the engine man to move forward, and as it happened a local freight was there, also, and I asked the crew to take the engine and come out behind the car and pull it back in the pathway.

Q. That is this car with the hot box? A. Yes, sir.

Q. As the phrase goes, you cut the car out at Milford, is that right? A. That is right.

Q. Did the train then couple back together and go on up to Potomac Yards? A. It did. I recoupled it and just went on.

Q. Mr. Cunningham, was there any other unusual occurrence on that run from Richmond to Washington that day? A. None that I know of.

Q. Was there a normal action of the brakes throughout all the rest of the run, including the stop at Potomac Yards? A. Yes, sir, so far as I know.

Q. Did you operate the brakes at any other time on that run except for the stop you made at Milford? A. I did not.

Q. How many years have you been a brakeman and conductor, Mr. Cunningham? A. Approximately fourteen years.

Q. Is that your total service with the railroad?
212 A. Yes, sir, since 1937.

Q. And you have ridden many freight trains in that time? A. Yes, sir.

Q. Have you also served on passenger trains? A. I have.

The Court: Mr. Preston, this is a good time to stop for lunch.

* * * * * * * * * *

213 Direct Examination (Resumed)

By Mr. Preston:

Q. I show you this paper and ask you simply what this is. A. This is the report that we make out when we have a hot box.

Q. Did you make that report? A. I did.

Mr. Preston: Will you mark this Defendant's Exhibit?

(Report on hot journal made by Mr. Cunningham was marked Defendant's Exhibit No. 1 for identification.)

Mr. Savage: No objection.

The Court: It will be received.

(Defendant's Exhibit No. 1 was thereupon received in evidence.)

The Court: Read it to the jury, if you think it is necessary.

Mr. Preston: This is the report signed by Mr. Cunningham indicating that he made a report of this particular car, hot journal loaded with paper and this report
214 was put in at Fredericksburg as the train passed.

By Mr. Preston:

Q. I show you three sheets of paper, Mr. Cunningham, and ask you to describe just what this is, briefly. A. This is known to us as Form 24. It is where we write the way bills, show the initials, the number.

The Court: I didn't hear.

The Witness: Whether they are loaded or empty.

By Mr. Preston:

Q. Is this also commonly called a wheel report? A. Yes, sir.

Mr. Preston: Will you mark this for identification, please?

(The wheel report, Form 24, was marked Defendant's Exhibit No. 2 for identification.)

The Court: You mean showing the makeup of the train?

The Witness: Yes.

The Court: The number of cars and whether they are loaded or not?

The Witness: Yes, sir, where from and to.

Mr. Savage: No objection.

The Court: It will be received.

(Defendant's Exhibit No. 2 was received in evidence.)

215 The Court: You may read it to the jury, so much of it as you think is necessary.

Mr. Preston: I would like to reserve that, if the Court please. I don't want to read all these numbers and X marks to the jury because I don't think it is of interest but this is a series of sheets where each line across here indicates one car, the railroad line, the number of the car, kind, whether it is empty or loaded, from one station to the other, the weight of the car, the weight of the load.

The second item here on the second page is actually the car in question that had the hot box.

The Court: The one with the red mark?

Mr. Preston: The one with the red mark, if the Court please.

This is three sheets, almost full, totalling the number of cars which, I believe, was 111 cars.

By Mr. Preston:

Q. I show you this sheet, Mr. Cunningham, and ask you what that is? A. This is an accident report.

Q. Did you make that report? A. I did.

Mr. Savage: No objection. You can offer it in evidence.

Mr. Preston: Will you mark it and I offer it at this time.

216 The Court: It will be received.

(An accident report was marked Defendant's Exhibit No. 3 and received in evidence.)

By Mr. Preston:

Q. Did you make all three of these reports yourself, Mr. Cunningham? A. Mr. Brooks filled in two sheets of that Form 24 which is known as the wheel report.

Q. Under your supervision? A. That is right.

Q. He was the brakeman with you? A. Yes.

The Court: What is the last exhibit?

Mr. Preston: This report here is a sheet written on two sides which the conductor fills out when there is a physical injury on board the train. This is his report to the railroad he turned in the next morning at Richmond when he returned down there and it indicates that Mr. Brooks was on the train, back injury and other questions. It says, "State fully any other information you have in the matter", and I read from the back side, which is the description, the original description of the accident.

"The engineer broke on the train just south of Signal 362. I thought he had seen the hot box and had applied brakes to stop, but as he approached Milford the
217 train began to increase speed. Then I had to apply air from the rear end of the train. The stop was so rough that it knocked the flagman down in the cab and injured him but I don't know to what extent."

This is signed "S. D. Cunningham."

Cross Examination

By Mr. Savage:

Q. Mr. Cunningham, the wheel report indicates that J. W. Florence was front brakeman, is that correct? A. Yes, sir, it is.

Q. That would mean he would normally ride up in the Diesel, some part of the Diesel? A. Yes, sir.

Q. And the car that had the hot box was loaded with paper? A. Yes, sir.

Q. Would this indicate the tonnage or would the tonnage be on your wheel report? A. That is the capacity of the car.

Q. But is there anything to indicate the actual weight of the load? A. I didn't catch all of that.

Q. Would there be anything to indicate the actual weight of the load? A. Yes, sir.

218 Q. What? A. It is shown in tons on the wheel report there.

Q. Would you mind pointing that out to us, please? A. I will be glad to. The car that is in question or just a car?

Q. No, the car that had the hot box. A. This is the car (indicating).

Q. And that indicates how much tonnage? A. Thirty-nine tons.

Q. And the capacity of that car was what? A. 120,000.

Q. 120,000 pounds? A. Yes, sir, which would carry 60 tons.

Q. And it was loaded to capacity then? A. No, sir.

Q. So at least we know the cause of the hot box was not overloading? A. I wouldn't think so.

Q. If journal boxes are properly lubricated and properly inspected, hot boxes should not develop, should they?

Mr. Preston: I object to the question because I am not sure he is qualified to answer, if the Court please.

The Court: Sustained.

By Mr. Savage:

219 Q. You have been a conductor for how long, Mr. Cunningham? A. I was promoted in '42.

Q. And, as such, you are familiar with journal boxes, hot boxes, and various appliances on freight cars, aren't you? A. Yes, sir.

Q. You know that they are supposed to be lubricated, I mean the journal boxes? A. Sure, that keeps them going.

Q. And I believe that the R. F. & P. gives you instructions that if a hot box does develop, you are supposed to stop and investigate, is that correct? A. Yes, sir.

Q. And in your years of railroading experience, you have seen hundreds of thousands of journal boxes, haven't you? A. Do you mean hot boxes?

Q. No, journal boxes. A. Oh, yes, sir.

Q. And would you know, in a general way, what causes a hot box to develop? A. Well, several things can cause it.

Q. What? A. The brass can get shifted, cuts the journal and causes it to run hot.

The Court: Please speak a little louder, Mr. Cunningham.

220 The Witness: Yes, sir. The waste gets dry and does not lubricate properly.

By Mr. Savage:

Q. Normally, these journal boxes are required to be inspected at each terminal, is that correct? A. Yes, sir.

Q. By the car inspector? A. Yes.

Q. And also lubricated at that point, is that correct? A. Not all terminals.

Q. If necessary? A. Yes, sir.

Q. In other words, he takes up the lid—he has a little appliance for that—he takes up the lid and he looks in there to see if the waste is dry and if it is dry, he pours oil in there, is that right, or grease? A. The car inspector?

Q. That is what I mean. A. The car inspector does not. They have oilers to take care of that.

Q. Under the supervision of the car inspector? A. I don't know whose supervision they would be under.

Q. It is either done by the oilers or the car inspector, is that correct? I mean the oil is put in there either by the
oiler or the car inspector? A. They have someone
221 over them to check on them. I don't know whether
it would come under the heading of the car inspector or not.

Q. I am not trying to confuse you. It is required to be done by some employee of the railroad? A. That is right.

Q. I believe you said, Mr. Cunningham, that you made a gradual reduction of the air from the conductor's valve on the rear of the caboose? A. Yes, sir.

Q. And at that time, you were out on the rear platform? A. Yes, sir.

Q. Which is approximately how wide? A. Approximately two and one-half feet.

Q. And your back was up against the end of the car? A. Yes, sir, the cab.

Q. The end of the cab, yes. A. Yes, sir.

Q. So that when this very rough stop occurred, your back was braced there and you were not injured? A. That is right.

Q. I believe you said it took you approximately a minute and a half to get from the cracked position, as you described it, gradually to the full open position with
222 the conductor's valve, is that correct? A. As I applied the air gradually for approximately a minute and a half, then I opened it all the way.

Q. Which should have given you what kind of application? A. Well, I tried to make a normal application.

Q. That is what you were attempting to get? A. Yes, sir.

Q. And had the brakes been operating properly, would you have gotten a normal application?

Mr. Preston: I object to that question, if the Court please, because I don't think he is qualified to answer.

The Court: I think he is. I think it goes to the weight of his testimony, as to how much weight the jury should give to the conductor is one thing but I believe he is sufficiently qualified to answer the question in view of his experience.

Mr. Preston: It is no longer necessary to note an exception.

The Court: I will hear you further—

Mr. Preston: No, nothing further.

The Court: You may answer.

The Witness: Repeat the question, please.

Mr. Savage: Will you read it to him, Miss Rawls, please?

223 (Thereupon the last question was read by the reporter.)

The Witness: Yes.

By Mr. Savage:

Q. Do you know how much train line pressure you had, Mr. Cunningham, when you left Richmond? A. I do not.

Q. Pardon? A. I do not.

Q. After this rough stop and you went back in the caboose, you saw Mr. Brooks lying on the floor and he was complaining some. What was he complaining of? A. He said, "I have hurt my back."

Q. I believe you helped set this car out, didn't you, set the car with the hot box out? A. Yes, sir.

Q. And that was where? A. At Milford.

Q. I believe you said you helped to put the fire out in the waste, is that right? A. I made the cut, moved the train forward. The local freight engine came out on the main line and took the car back in the side track and I left it in charge of the local freight men.

Q. The waste in the journal box was on fire at that
224 time? A. Yes, sir.

Q. The lining of the journal box, which is next to the axle, is known as what? What do they call that, if you know? A. I don't get what you mean.

Q. What is it, what is the Babbitt in a journal box? A. The brass.

Q. Yes, brass or Babbitt, is that right? A. You mean the thing that you replace?

Q. That is right. A. Call it the brass.

Q. What happened to that when you set the car off? Did you notice that? A. No, sir, I did not.

Q. Do you know what condition that was in? A. I do not but the car was hot.

Q. Sufficiently hot to melt that Babbitt? A. Probably some of it was melted. I don't know that all of it was.

Q. Some of it was melted?

Mr. Preston: I am not at all sure he saw that.

The Court: Did you see the brass melted?

The Witness: I pulled the lid off of the box, sir, and it was on fire but it is hard to tell anything about it with the burning.

225 The Court: Then if you didn't see it, say so. Did you see any of the brass melting?

The Witness: No, sir.

The Court: Very well.

The jury will ignore that last answer.

By Mr. Savage:

Q. But it was hot enough to melt it? A. It was on fire. That is all I can tell you.

Q. And this was a car of paper, wasn't it? A. Yes, sir.

Q. What kind of car was it? A. Box car.

Q. Metal or wood? A. I don't remember.

Q. Would your wheel report indicate that? A. No, sir.

Q. What kind of car was it, a box car, you said? A. Yes, sir.

Q. Most of them are wood, aren't they? A. I don't know.

Q. Would you be able to refer to the number and tell whether or not it is a wooden or metal car? A. No, sir, they run about fifty-fifty, I would say.

Q. Do I understand you to say that you don't know how much train line pressure you had leaving Richmond?

226 A. I do not.

Q. Do you know how much train line pressure you had at the time the engineer made the application of air just before the accident? A. I do not.

Q. Do you know how much air line pressure there was in there when you applied the air? A. No, sir.

Q. It is necessary for a brakeman, in the course of his work, to apply hand brakes on cars, isn't that right? A. The cars that are set off?

Q. Yes. A. Along the line.

Q. And to climb ladders and get—

Mr. Preston: If the Court please, we have gone into this before and, if it is for the same purpose, Mr. Savage, I will concede it.

Mr. Savage: This will be very brief.

By Mr. Savage:

Q. Is that correct?

Mr. Preston: I conceded that.

By Mr. Savage:

Q. Do brakemen, in the course of their every-day operations, get on and off moving cars and locomotives? A. I don't get what you mean.

227 Mr. Savage: Will you read the question, Miss Rawls?

(Thereupon the pending question was read by the reporter.)

The Witness: Yes.

By Mr. Savage:

Q. And it is often necessary for them to go over the top of moving cars, isn't it? A. No, it is not required.

Q. I didn't ask whether it was required, but they often do it, don't they, in the course of their work? A. I do not.

Q. But you know from experience that, in the course of their daily routine and work it is customary for them to go over the tops of moving cars, isn't that correct? A. No, sir.

Q. Do you know what the required train line pressure is? A. Seventy pounds.

Q. Do you know anything about a PC switch on a Diesel? A. No, sir.

Q. You are not required to know anything about that? A. I am not.

Mr. Savage: Thank you, Mr. Cunningham.

Mr. Preston: I have no redirect.

228 The Court: Stand down, Mr. Cunningham, and take a seat in the courtroom.

(Witness excused.)

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Charles Edward Troland was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

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233 Q. Specifically, Doctor, have you found that there is any evidence of recurrence of the disc condition which was the reason for the first operation? A. I have not.

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234 Cross Examination

By Mr. Savage:

Q. As the result of the operation in June of 1948, Mr. Brooks was able to return to work August 17, 1948, is that correct? A. I was told that he went back to work, yes. I discharged him in July.

Q. And assuming that he did, that would be a very successful result? A. Excellent.

Q. That would indicate he had a stable back if he was able to return to work as a railroad freight brakeman on August 17, 1948? A. Yes.

* * * * * * * * * *

239 Q. That is all I want to know.
Of course, Doctor, you can have a severe back injury without any neurological symptoms at all, can't you? A. Certainly.

Q. And you can have a severe back injury without neurosurgery being involved at all? A. Yes, sir.

Q. And a back injury could require a fusion with-
240 out neurosurgery being involved? A. Certainly.

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245 **L. E. Carlson** was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

246 Q. Mr. Carlson, will you give us your full name and address, please? A. L. E. Carlson. My place of business is 916 Ring Building and I reside at 1600 Sixteenth Street, Northwest.

Q. By whom are you employed, Mr. Carlson, and in what capacity? A. I am the Southeastern District Engineer for the Westinghouse Air Brake Company.

Under those facts as given you, Mr. Carlson, can you form an opinion as to whether or not there was any malfunctioning of the brakes? Just answer that. Can you form an opinion as to whether or not there was any malfunctioning of the brakes or any defect in the equipment?

The Court: Yes or no.

The Witness: Yes.

Mr. Preston: What is that opinion, Mr. Carlson?

Mr. Savage: Objected to.

The Court: You say you object?

Mr. Savage: Yes.

The Court: On what ground?

Mr. Savage: There was an essential part of the hypothetical question left out. I am sure it was an inadvertence but Mr. Preston said that the conductor cracked the valve and then opened it. The conductor said that he
250 cracked the valve and opened it very gradually and
took a minute and a half to do it. That is the principal objection to it.

The Court: I noticed that also.

Mr. Preston: I will accept the amendment.

The Witness: What were those times again, please?

(Thereupon, the portion indicated was read by the reporter.)

Mr. Preston: Can you form an opinion on that basis?

Mr. Savage: I think one further qualification. I don't know whether or not Mr. Carlson has any familiarity with the emergency valve in the caboose. We find an assistant road foreman of engines with 38 years of experience who does not know much about it. I don't know whether Mr. Carlson does or not, but I think he had better be qualified on that.

The Court: Yes.

Are you familiar with the valve on the caboose and how it operates?

The Witness: There are several types.

The Court: Yes or no. Are you?

The Witness: Yes.

Mr. Savage: All types?

The Witness: If they are manufactured, yes.

Mr. Savage: If they are manufactured?

The Witness: Some may use a homemade valve
251 and, of course, under those conditions I would not know about it.

The Court: Let's withdraw the witness and put somebody back on to find out what kind of a valve was on there. Haven't you got somebody you can call?

Mr. Preston: I can call Mr. Cunningham who actually pulled the valve.

The Court: You haven't anybody from the railroad who knows definitely what kind it was? If you wish, you may call Mr. Cunningham.

(Witness Carlson excused temporarily.)

252 Thereupon, **Samuel D. Cunningham**, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—Resumed

By Mr. Preston:

Q. Mr. Cunningham, was the valve on the cab a standard type of manufactured valve? A. Yes, sir.

Cross-examination—Further

By Mr. Savage:

Q. Do you know the name of it? A. Only as a brake valve.

Q. You don't know the name of the manufacturer of the valve? A. No, sir.

Q. You have seen some that were made in the shops of the railroad, have you? Do you understand my question? A. No.

Q. Have you ever seen any valves that were made in the shops of the railroad? A. Not to my knowledge.

Q. Not having seen any made in the shops of the railroad, you wouldn't know the difference between a manufactured valve, and a so-called homemade valve, would
253 you? A. I would.

Q. You would know the difference? Do you know the names of the various manufacturers? A. No.

Q. You don't know who manufactured this one? A. I do not.

Q. Are you reasonably certain it is a manufactured valve, and not a homemade valve? A. I am.

Mr. Savage: All right.

The Court: You base that opinion on the fact you have seen a number of the same type, which were similar in appearance?

The Witness: Yes, sir.

The Court: All right. Step down.

(Witness excused.)

The Court: Resume the stand, Mr. Carlson.

Thereupon, **L. E. Carlson** resumed the witness stand and testified further as follows:

Direct Examination—Resumed

By Mr. Preston:

Q. I believe you heard Mr. Cunningham's testimony? A. Yes.

254 Q. May I now have the answer to my question which was did you have an opinion as to whether or not under the facts as described to you in the hypothetical question there was any evidence of malfunctioning of the brakes, or defective equipment?

Mr. Savage: He better qualify that further and state what condition the valve was in at the rear of the conductor's caboose.

Mr. Preston: By condition? I don't understand.

Mr. Savage: Whether it was in good condition, working condition or not. Apparently there is a distinction between the valve and the air brake system. You better tell him what condition that was in, because not knowing what condition that was in, he can't answer your question.

Mr. Preston: Did Mr. Cunningham testify whether it was in good or bad condition?

Mr. Savage: You did not ask him.

Mr. Preston: Mr. Cunningham, will you resume the stand again, please?

(Witness excused.)

Thereupon, **Samuel D. Cunningham** was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

255 Further Direct Examination

By Mr. Preston:

Q. Was the valve on the caboose apparently in good working order?

Mr. Savage: I object to the question.

The Court: Sustained. Apparently is the word he objects to, I assume, isn't it?

Mr. Savage: That is it.

By Mr. Preston:

Q. Was the valve on the caboose in good order, and did it work in a normal fashion when you operated it? A. It did.

The Court: Stand down, Mr. Cunningham.

(Witness excused.)

Thereupon, **L. E. Carlson** resumed the witness stand and was examined and testified further as follows:

Direct Examination—Resumed

By Mr. Preston:

Q. I believe you heard that this valve operated normally, and was in good condition.

Mr. Savage: In the conductor's opinion.

By Mr. Preston:

Q. In the conductor's opinion, a man with 14 years
256 experience.

Will you give us your opinion, please, Mr. Carlson? A. There was nothing to indicate there was any malfunctioning of any of the equipment.

Q. Is there anything in your opinion to indicate there was a defect in the equipment? A. No, sir.

Q. Will you explain your opinion, please, Mr. Carlson? A. Well, the fact that it stopped within a reasonable distance after the conductor operated the caboose valve.

Q. Now, I think it is a rough stop which we are concerned with in this case, particularly.

The Court: An unusual, violent stop.

By Mr. Preston:

Q. An unusual violent stop. A. Yes.

Q. Are there circumstances which were described to you in the hypothetical question which would explain an unusual violent stop under those circumstances? A. I believe that that would have been normal. You would get a violent stop.

Q. Will you explain that opinion, please, Mr. Carlson? A. You would have a much higher pressure or heavier braking force on the front of the train. Therefore your slack would run in and cause a shock at the caboose.

257 Q. By slack running in, you have been with the railroading business, or parallel to it in the air brake business for a long time. Would you explain what you mean by that phrase, Mr. Carlson? A. Well, your cars at the front of the train would be braking heavier than the cars at the rear. They would tend to stop quick, so the ones at the rear would tend to run into them.

Q. What effect would describe the differential in pressure force so far as the running is concerned? A. Well, the more pressure you had on the front of the train, the more differential in braking between the front and the rear, the more severe the shock.

Q. And would a 30-pound differential or thereabouts cause an unusually violent shock? A. Yes, especially if it was at the speeds that you mentioned.

Q. An increase of speed at that time? A. And the speed which you mentioned. I believe it was 40 miles an hour.

Mr. Savage: The speed he mentions was only 40 miles an hour, was it?

The Court: What is that?

Mr. Savage: I think the speed Mr. Preston mentioned in his hypothetical question was 40 miles an hour.

258 The Court: That is my recollection. What did you understand, Mr. Carlson?

The Witness: I understand they were going 50, and had made a brake application, and then the speed had increased to 40.

Mr. Preston: That is exactly my description of it.

That completes the direct examination of Mr. Carlson.

Cross-examination

By Mr. Savage:

Q. Mr. Carlson, as representative of the Westinghouse Air Brake Company, you are naturally interested in seeing that railroads buy your brakes? A. Yes.

Q. What part of the braking system does your company manufacture? A. All parts.

Q. Including the compressors? A. Yes, not all of them. There are other manufacturers, but we do manufacture compressors.

Q. Do you know whether or not you manufactured the compressors on this particular Diesel involved in this accident? A. We did not.

Q. Pardon? A. We did not.

259 Q. They were not your compressors? A. No, sir.

Q. What part of the brake system—— A. On that particular locomotive, we had everything except the compressor.

Q. And on the cars, what Westinghouse equipment did you have? A. I would have to know who owned all the cars, that is, some railroads buy from us, and some buy from other companies.

Q. Are you familiar with all types of equipment? A. Yes, sir. If it is what is known as a standard, it has to be the same on all cars, regardless of who makes it.

Q. It has to comply with certain specifications? A. Yes, sir.

Q. Have a certain amount of piston travel, is that right? A. That is right.

Q. Certain type of triple valve? A. Yes.

Q. Certain type of brake shoes, is that correct? A. I can't say as to brake shoes.

Q. You don't know? A. I can say that as to the triple valve and the working parts.

260 Q. And the very purpose of the Westinghouse air brake equipment, and one of its selling points is the fact that you can make an even reduction of air, and secure a normal service application, is that correct? A. Under normal conditions.

Q. Yes, and normal conditions would mean equipment in good order? A. I mean under normal conditions of handling the train.

Q. Yes. And a part of the normal conditions would be equipment in good order? A. That is right.

Q. And if you had 80 pounds of air pressure in your Diesel, as shown on the gauge, and only 50 pounds in the caboose, it would show that the equipment was not in good order, wouldn't it? A. No, sir.

Q. It would not? A. No, sir.

Q. Do you mean to say, then, it is usual and customary to have a 30-pound differential, so that any application of air from the rear would produce a rough and violent stop? A. Following the reduction in brakes from the locomotives, you would have that condition.

Q. Assuming you only had a slight reduction, a reduction not as much as 30 pounds, and yet you had a 30-
261 pound differential, is that a usual and customary
condition? A. As I understand it, the gauge on the caboose showed 30 pounds, that is a 30-pound differential. That means the reservoirs at the rear end were not charged above 50.

Q. Say that again. A. The gauge on the caboose showed 50 pounds?

Q. Yes. A. That indicated that the previous reduction had pulled the air below that, and it had not been recharged above 50.

Q. Suppose only a 15-pound reduction. It would not indicate that, would it? A. Yes, because when you make a 30-pound reduction, it has to be a 30-pound reduction. Otherwise the gauge would not have shown 50 pounds on the caboose.

Q. You are assuming there were no leaks in the train line? A. No. I am merely taking the condition on the caboose.

Q. Actually, you don't know whether there were any leaks in the train line or not? A. No.

Q. And if there were leaks in the train line, that could account for the differential? A. Yes, sir.

262 That would constitute an inefficient braking system? A. Yes, if there was abnormal leakage.

Q. And if there was a 15-pound reduction only, but a differential of 30 pounds, that would indicate leaks in the braking system, wouldn't it? A. It depends on how long the engineer stayed in lap position.

Q. Assuming he was not in lap position at that time. A. It is customary after reduction to go to lap position. During that time the leakage——

Q. There was nothing in the hypothetical question about lap position. You will have to assume he hadn't gotten into lap position. Try to answer my question just on the points stated to you, but if there is a 15-pound reduction in the engine, and a 30-pound differential between the gauge in the engine and in the caboose, that would indicate leaks in the train line, wouldn't it? A. Yes.

Q. Which would be an inefficient braking system, wouldn't it? A. Well, there is allowed a certain amount of leakage.

Q. Just answer the question. A. Not necessarily.

Q. There is allowed a certain amount of leakage?
263 A. Yes.

Q. How much? A. According to the A. A. R. requirements they are allowed——

Q. How much? A. 7 pounds permissible.

Q. If you start out from Richmond, 36 miles away from the scene of the accident with 80 pounds of air pressure in the engine and 50 pounds in the caboose, that would indicate what with regard to the efficiency and operation of the brakes? A. You would have abnormal brakes, pipe leakage.

Q. Repeat that. A. Abnormal brakes, pipe leakage.

Q. Abnormal brakes, pipe leakage? A. Yes.

Q. Which would cause a rough stop? A. Right.

Q. If the conductor's valve in the caboose is applied very gradually, first cracked, and then opened very gradually, taking a minute and a half to reach the open position, assuming, now, the brakes are in good condition, and that you have the proper train line pressure, what sort of stop should you get? A. Are you speaking of this particular case, that is, where he started a reduction following
264 a reduction from the locomotive?

Q. Answer the question first in a general way. Then you can qualify it, if you wish. A. Ordinarily, yes, it would give a smooth stop.

Q. A smooth stop? A. Yes, sir.

Q. When you answered Mr. Preston's question before, you based your opinion upon what you said, because of the fact that he got a reasonably good stop? A. Yes.

Q. He stopped within a reasonable distance, is that right? A. Right.

Q. That only has to do with the fact that the train stopped, and not with what kind of stop it made? A. Right.

Mr. Savage: That is all. Thank you.

Redirect Examination

By Mr. Preston:

Q. Mr. Carlson, I believe you testified that if there were a 30-pound differential at the time the train started, 80 pounds at the time the train started, in answer to Mr. Savage's question, 80 pounds of pressure in the engine and 30 in the caboose, that would indicate abnormal——

Mr. Savage: Not 30, 50.

265 By Mr. Preston:

Q. 50, that would indicate an abnormal leakage? A. That is correct.

Q. On the other hand, I believe you also testified that there is a seven-pound permitted leakage? A. That is permissible by the A. A. R. rules.

Q. If a leakage of four pounds were found, would that be permissible? A. Yes, anything up to seven.

Q. Anything up to seven is permissible? A. That is right.

Mr. Preston: I have no more questions.

Recross-examination

By Mr. Savage:

Q. With cross compound pumps, and a brand new Diesel, or a Diesel very nearly new, very well equipped, and with only a 15-pound reduction from the engine, and with the conductor's valve on the caboose being applied over a period of a minute and a half, making a total of three and one-half minutes, if you had a 30-pound differential, three and one-half minutes, after a 15-pound reduction, what would that indicate?

Mr. Preston: If Your Honor please, I don't understand the question.

The Witness: I don't believe I do, either, sir.

Mr. Savage: I will repeat it.

266 By Mr. Savage:

Q. Assume, now, this was a new and modern Diesel, that it had cross compound compressors, that they were of the latest type, and I believe you said this was a very modern piece of equipment, almost new was the way I think you described it, and that you had 80 pounds of pressure on this gauge in the cab of your locomotive, and that a 15-pound reduction was made by the engineer, and that two minutes later the conductor on the rear attempted to make a service application by the use of the conductor's valve, and did so in a very gradual manner, first cracking it, and then getting it to open position, covering a minute and a half, and at that time you had a difference of 30 pounds between your engine and your caboose, in short, 80 pounds in your engine and 50 pounds in your caboose, what would that indicate to you?

Mr. Preston: I object to the question, because I don't know whether Mr. Savage is assuming all these facts in addition to the facts that I had in my hypothetical question, or if the statements of Mr. Savage are to stand alone without the other circumstances which I described in my hypothetical question.

In other words, I don't understand whether his question is a composition of both, or it stands all alone. For that reason I object.

The Court: Objection overruled. You may answer.

267 The Witness: In order to answer your question, I would have to know or have some idea of the time that elapses from the time the engineer moved his brake valve to release, and the conductor started his application at the rear.

By Mr. Savage:

Q. I have given you time. A. You gave me the time from the start of the application. I want the time from the start of the release at the locomotive to the time the conductor started to use his brakes at the rear.

Q. Let us say it was a period of three minutes.

Mr. Preston: If the Court please, I object to that. I don't believe there is any evidence on that.

The Court: I don't know of any evidential basis, but this is cross-examination.

Mr. Preston: It is just hypothetical.

Mr. Savage: So was yours.

The Court: You may answer.

The Witness: Again I would have to know the lowest pressure that was shown on the caboose after the reduction. Was this 50 pounds the lowest pressure shown on the caboose?

Mr. Savage: This is correct.

The Witness: Or was that the pressure at the time the conductor started his application?

By Mr. Savage:

268 Q. At the time he started. A. What was the lowest pressure obtained on the caboose?

Q. When? A. Following the reduction.

Q. Zero.

Mr. Preston: What?

The Witness: If it was zero, I would say that the brake pipe leakage was normal.

The Court: What?

The Witness: The brake pipe pressure was normal, if that is what was shown on the caboose.

The Court: I can't understand you. The brake pipe pressure was what?

The Witness: That the pressure shown on the caboose would be normal under those conditions.

The Court: Normal? That is the word I didn't hear.

The Witness: If the pressure was zero following the reduction.

By Mr. Savage:

Q. I didn't ask you whether or not the brake pipe pressure was normal. I ask you whether or not if there was a 30-pound differential under the circumstances I have given you three minutes after the engineer returned his valve to a normal position, if that would indicate an unusual leakage? A. If the pressure on the caboose went to zero
269 and showed 50 pounds after three minutes, it would show normal brake pipe leakage.

Q. You don't quite understand. It didn't go to zero before the application. It went to zero following the application. A. Following the application? That is what I meant.

Q. How did you account for the 30-pound differential? A. Because on a train of that length, it would take you, I would say, 10 to 12 minutes to fully recharge the caboose.

Q. Fully recharge? A. The caboose.

Q. Wait a minute, now. Fully charge 15 pounds? A. No. If it went to zero, it would have to come back up to what it was originally.

Q. Mr. Carlson, you don't understand. We are not talking about the same thing. We will try again.

It was 80 pounds in the engine. It was 50 pounds in the caboose after the engineer had made a 15-pound reduction. The engineer made a 15-pound reduction, and three minutes later there was still 50 pounds of pressure in the caboose and 80 pounds in the engine. What does that indicate with regard to air leakage? A. I would have to know what the engineer did with the brake valve, how long
270 he had been attempting to recharge the train.

Mr. Savage: That is all. Thank you.

Mr. Preston: I have no further questions, if the Court please.

The Court: Mr. Carlson, can you make a service stop by reduction of air by operation of the valve on the caboose?

The Witness: Yes.

The Court: What are the elements necessary to make a service stop under those circumstances?

The Witness: He has to move the valve to a partially open position.

The Court: And then what?

The Witness: Hold it there until the train stops.

The Court: Then if he moves it completely, what would that create, an emergency stop?

The Witness: Yes, sir.

The Court: Irrespective of the amount of air?

The Witness: Yes, sir.

The Court: If the air had been reduced just a few minutes previously would that have anything to do with the kind of stop that would be expected?

The Witness: It would affect the severity of the stop, but with the modern equipment, you would still get an emergency application if you moved it all the way to open stop.

The Court: Are those valves calibrated on the caboose?

271 The Witness: More modern types are. The earlier types are not. It was up to the judgment of the men operating them how far to go. The latter ones have notches, numbered 1, 2, 3 and 4.

The Court: The earlier ones did not have?

The Witness: No, sir.

The Court: Can you say if you got in the half way mark, whether it was notched or not, that would produce a rough stop?

The Witness: Well, the pressure on the line would have some effect, on how far over you would have to go in order to get a rough stop. If your train was fully charged, I would say past half way. Under conditions similar to this, if you were not recharging, you have got to go a little further than that.

Mr. Savage: An emergency stop doesn't necessarily have to be a rough or violent stop, does it?

The Witness: No, sir.

Mr. Savage: It does not?

The Witness: No, sir.

Mr. Savage: And if the brakes are in proper order, you can get an emergency stop without it being a violent stop?

The Witness: That is correct.

Mr. Savage: Thank you.

272 The Court: I don't understand the difference between an emergency stop and service stop.

The Witness: You get a higher pressure, a greater braking force with an emergency than the service.

The Court: It is stopped more quickly in the emergency?

The Witness: Yes.

The Court: And when you stop more quickly, you get a rougher stop, don't you?

Mr. Preston: Mr. Carlson, just because you get a rough stop doesn't mean you have bad brakes on a freight train, does it?

The Witness: No, sir.

Mr. Savage: Have you frequently operated a conductor's valve with trains in motion?

The Witness: No, sir.

Mr. Savage: Have you ever done it?

The Witness: No, sir.

Mr. Savage: That is all.

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William A. Deyerle was called as a witness by the defendant and, having been first duly sworn, was examined and testified as follows:

273 Direct Examination

By Mr. Preston:

* * * * * * * * * *

275 Q. In December, 1949, in the course of your practice, did you come in contact with Mr. Thomas M. Brooks? A. Not in December.

Q. When did you come in contact with him, Doctor? A. On the 14th of January, 1950, I first came in contact with him.

Q. What were the circumstances of that? A. I was asked to see this patient at the request of Dr. Rawles, who had the patient at the Retreat for the Sick Hospital, and I was requested to see him.

Q. What were his complaints when you first saw him? A. He complained of pain in his back and both legs more marked, probably in the left leg.

Correction. Let me look and see. That is some little time.

More prominent on the right side, right leg.

Pain in these areas, for which it was necessary for him to take hypodermics to relieve that pain. The pain came on following an accident.

276 Q. Yes, just stop there. Did he give you a history when he came to see you? A. Yes.

Q. What was that history? A. That history was that following an accident in December prior to that month I think it was December 12 of 1949, at which time he was thrown to the floor of a caboose, and landed on his back parts, and on some keys which were either in his pocket or hanging from his belt, I am not sure.

And he was in considerable pain following that, and reported to Dr. Rawles, and had been under Dr. Rawles' care.

Dr. Rawles had seen fit to put him in bed at home, and he did not respond very satisfactorily, so he put him in bed at the hospital. He stayed there for several days, and was given a brace and returned home, again advised to remain in bed.

Q. Doctor, why were you called into the case? A. I was called in because the doctors were unable to determine why he had not responded after seven weeks to what they thought was an average type of back injury.

Q. Were you called in as an orthopedic consultant or specialist in this case? A. Yes.

Q. How many times did you visit Mr. Brooks in January prior to the operation which was performed on him?

277 A. Well, I visited him daily with the exception, probably, of one Sunday from the 14th to the date of the operation.

Q. What was the date of that operation? A. 28th of January.

Q. About two weeks? A. That is right.

Q. You saw him every day? A. That is right, with the possible exception of a Sunday in there. I am not sure of that.

Q. Did his condition improve? Did his symptoms improve at all during that time? A. No, they did not.

Q. Did any additional symptoms appear, or did they remain the same? A. His complaints varied, but the general picture of his discomfort was consistent. Sometimes the pain was in both legs, sometimes it was a little more in one than it was in both, but his general discomfort and pain was consistent.

Q. During that time did you find any specific cause for his complaints, for his pain? A. We felt that the man had sustained—

Q. Not "we," but you. A. I.

Q. Yes.

* * * * * * * * * *

278 A. I felt that the man had sustained a back injury as a result of his fall, and I felt that the nature of this back injury was probably some local bruising as a result of having hit the keys. However, there was no bruising apparent. That is not necessarily always apparent. That is, there was nothing you could see.

I felt he had sustained a muscle strain of the muscles of the back that support the body, the muscles had been strained.

I felt, however, in view of the passage of time, and the treatment that he had received, that it was not usual for him not to have improved. Rest in bed is the treatment of choice in all such back injuries.

Q. You say treatment of choice. I don't understand what that means. A. That is the treatment that is used in this type of back injury, that is the preferred treatment, that is the best treatment we have at our hands at this time.

Q. Is it generally successful treatment? A. In back strains and contusions, bruises that this man apparently sustained, it is usually successful.

Q. Was any effort made to find out whether this man had any broken bones or fractures or chipping of his back? A. I beg your pardon?

279 Q. I say chipping. A. Chipping?

Q. Of the vertebrae. A. Yes, he was X-rayed at the Medical College of Virginia following his injury, and those X-rays revealed no evidence of any fracture, breaking, or chipping.

Q. Did you see those X-rays? A. Yes.

Q. You examined them? A. Yes.

Q. Did you find any evidence? A. No, no evidence of any injury.

Q. To the bone? A. Or abnormality of the bone.

Q. Well, now, were the complaints particularly intense? A. They were extremely intense. As I put it, the complaints were out of proportion to what we could—to what I could find on any examination at my disposal. In other words, if I might clarify that?

Q. Sure. A. People having pain usually have some objective finding that you can locate, see, or in some way measure to account for that pain, and in this instance the complaint of the pain greatly exceeded anything that I or any laboratory facilities that I had available to me could point to as the cause of the pains.

280 In other words, this man was suffering a lot of pain, but I was unable to find any orthopedic cause for that pain.

* * * * * * * * * *

282 Q. What other types of tests did you do to determine the cause of what was Mr. Brooks' difficulty? You say you performed a full physical? A. Can I elaborate on that?

Q. Please do. A. We do a straight leg raising test, which indicates tension on the legs when you raise the legs in this position with the legs straight, if that gives pain, that indicates something in the tension of that raising the leg is causing irritation of nerves, and therefore giving pain. If the individual is unable to raise the leg very high, that indicates there is something causing pressure.

In this patient's case, on occasions both legs were maredly limited.

Q. Markedly what? A. Limited in the ability to raise the legs, in other words, to come up to what would be considered average, normal. He couldn't do it with either leg.

283 On other occasions, he could come a little further with his left leg than his right leg, indicating to me that something was preventing this man responding in a normal fashion to these tests. This test is designed to show whether or not there is something irritating the nerves.

There was also motion test of the back to see whether the motions of the back were limited. There was marked muscle spasm. The back was held extremely rigid as a result of this muscle spasm. It was quite painful in any effort to examine him.

That made it necessary to repeat examinations, to attempt to come to a conclusion, because he was painful, and we could not get very much motion in his back to measure the amount present, nor could we get satisfactory leg raising tests.

Q. You say it was painful to do this and painful to do that. How did you know it was painful to do that? A. I don't know it was painful. Pain is something the patient states that he feels. I am unable to detect pain. He has to detect pain, and tell me. If he says it pains, I make an effort to find the cause of the pain.

Q. Well, now, were there other important tests you did
on this man besides back-bending and leg raising? A. We
did sensory tests, namely, tests that test the sensation of
the skin of the extremities, with the idea that pressure on
a nerve might decrease the ability of that limb to
284 feel a very soft touch, a sharp needle. Any of those
things might be changed. There was no consistent
pattern to that. Sometimes there was an area—

Q. Stop there. You used a word and I didn't understand you. A consistent pattern, what does that mean? A. The consistent meaning, in testing him with a needle, the prick of a needle, at times there would be a numb area under his right knee, or left knee. At other times that would not be numb, there would be a numb area elsewhere.

To be of help in localizing, or an indicator as to what nerve is being pressed upon, that test must be consistent, must be the same in repeated examinations, and when it is not the same at repeated examinations, we do not feel that change of sensation is a result of pressure.

In other words, if there is any change in sensation that is not present consistently, if it doesn't remain, if it is numb on the left knee on Monday, it should be numb on the left knee Wednesday night and Thursday morning. If it is numb on the left knee, the next time not numb and numb somewhere else, we consider that an inconsistent finding, and a finding that does not indicate any pressure on a nerve.

Q. Getting back to his back again, were you able to make
any diagnosis as to the difficulty in Mr. Brooks' back that
was satisfactory to you? A. In my opinion the man
285 had the possibility of having reinjured his disc that
had previously been operated upon, this cartilage
material that can rupture out and press on a nerve, and the
possibility of having reinjured another disc.

This was because the man had an absent ankle jerk, which was absent before his first operation, and was absent after the first operation, and was still absent, but that is one of those things that clouds the picture from the standpoint of our being able to tell exactly what was wrong, and we were not satisfied with this man's findings, what we could find out from examining. We were not satisfied that he was having continual pain, the two did not go together, because he had more pain than we could account for, so we were not satisfied with our findings, although I had no definite diagnosis I could make to account for his pain at that time, because I did not feel the diagnosis of the back strain and bruises would continue to give this man pain after seven weeks time, and during which he had been at rest.

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288 Q. Did you find, yourself, any evidence of the nerve root pressure on the herneated disc in his back? A. No, I was the first assistant until he left, and I saw no evidence of trauma, and he demonstrated the nerves lying free, in their normal position, and no evidence of any ruptured material, or any evidence of injury that we could see, and we had a very good view of it.

Q. After Dr. Trolland's portion of the operation was completed, you then took over as the chief surgeon? A. I did.

Q. What did you do, Doctor? A. Well, in the process of looking for the disc, it appeared to me there was more motion present in the lower back joint than average, what I call increased motion, or increased motility. In other words, our backs have a certain amount of motion. This seemed to have more.

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290 Q. Following the operation on this patient, how did the patient fare? A. His general course, postoperatively was, of course, local pain, following the operation anybody has local pain. That seemed to gradually subside.

His complaints referable to his limbs and back improved on one day, and the next day they were not so much better, and there was a fluctuation of his complaint, but essentially the same fluctuation as he had before. The change of his complaints was about the same as he had before the operation. In other words, he continued along. He had to have large doses of narcotics or hypodermics to allay his pains.

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293 A. He remained in the hospital for approximately four weeks' time following his operation. At the end of about the third week, we applied a body cast. It goes from the nipple down to the lower legs, roughly in the back and front to immobilize him to decrease the motion and this was left on for approximately four months.

Mr. Brooks was sent home in an ambulance because he was unable to get about without right much pain. After going home, he again began a period of progressive
294 activity, first feeling his way around the bed and gradually increasing his walking. He was in the office at bi-weekly intervals.

At the end of approximately four months from the date of his operation, the cast was removed and a brace, a metal brace covered with leather was applied and he wore this during the daylight hours, took it off at night, for two months' time.

During this period in the cast and brace, he improved in his general strength and his general well being but he continued to have considerable pain in his entire back, both down near the site where the operation was performed as well as up high and had pain in both legs, somewhat more marked in the right but a feeling of pain in both of them.

Mr. Brooks complained specifically of a burning feeling in his right heel at frequent visits.

At the end of six months' time, X-rays were made and it was felt the fusion was progressing satisfactorily and he was told to gradually discontinue the use of his back brace which he did over a period of probably a month and a half. At times, when his back hurt him badly, he would put the brace back on.

From that time on, his condition remained more or less static. He would be a little better one time and a little worse the next time but he required considerable medication in the form of codeine for his pain and some-
295 thing especially to sleep. He complained that at
night the pain would be so bad that he would have to get up and move around or just could not get rid of his pain, it seemed, anyway. I believe his pain was probably worse at night than during the daylight hours, the way he described it.

Q. Doctor, during this recuperation period, did you continue with the various tests which you described such as the leg raising test and other standard aids in your diagnoses and treatment? A. At intervals, I performed portions of this as it seemed to be indicated and on probably two different intervals completely repeated the whole examination. It seemed to me the last time was in November of last year that I gave him a thorough checkup.

Q. What improvement, if any, in the man's condition did you note? A. Well, his complaints, as I say, from the time he came out of his brace or during that interval remained about static from there on in. There were times when I felt he walked better and there were times when I thought that he walked with considerable more limp than I could account for.

Q. Was this limp in the right leg or the left leg? A. Well, there was a generalized stiffness in his back that made him walk with an unnatural gait, not only the operative site but the upper back. Also his right leg, he
296 walked with a stiff knee to a certain extent on the
right leg. That varied. Sometimes it was better, other times worse but his main disability, as far as his gait was concerned, was that he walked with the right knee in a stiff position.

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298 Q. Doctor, from your observation of Mr. Brooks
over the course of approximately 18 months now,

from your treatment of him, from your observation of his recuperation, have you formed an opinion as to his present condition? A. Yes.

Q. Will you tell us what that opinion is, Doctor?

299 A. I think Mr. Brooks has a certain definite limitation in his ability to perform his previous activities. I don't think that inability to perform his previous work is as great as he feels that it is and as the average individual who observes him might think that it is. In other words, I can't see why he has not been able to do light work and I have told him so and talked with him about this on many occasions.

I have told him that light work would actually be beneficial and I feel that it would and I feel that if he would return to light work, that he may eventually approach his previous condition. How closely he will approach it, I can't say, but I do know there has got to be a period of light work before he returns to anything approaching his previous occupation and he may never completely come back, but he should be able to work, be able to earn a living and be a useful citizen.

Q. Doctor, in further explanation of your answer, are you satisfied that you have found the cause or a cause for all of Mr. Brooks' symptoms?

A. I can't account for his symptoms. Anybody who has had a disc removed at one previous operation and a spinal fusion at a second operation is due to have some disability but the disability he has exceeds any that I could explain on the basis of any orthopedic changes of any sort or
300 any nerve pressure that might result from those two
operations so I cannot account for the quantity or the amount of symptoms that this patient has.

I think he is due to have some pain. Some people have known some. Most people who have these two operations do have some pain but not of the amount that he has.

Q. Would you say from the tests that you have made and the observation that you have had of Mr. Brooks that there is an element of exaggeration in his complaint of pain and disability? A. Yes.

Q. Can you measure that? A. You cannot measure the man's complaint of pain. That is a personal thing. He feels the pain.

I can say from all I can make out from examining this man I cannot account for the amount of pain that he has and I feel that there is an element of exaggeration for that reason.

Q. Do you have tests, any objective tests by which you can determine how much or how intense a given pain may be? A. I don't know of any.

Q. What do you have to rely on? A. You have to rely on your experience with similar cases. Your objective findings that you do have, for instance, if you examine a
301 patient and you find a condition that you know is
likely to cause this type of pain then you feel that that very likely is the cause for it and if you don't find that condition and, in his instance, the thing that indicated to me that there was an exaggeration of symptoms was the fact that his back remained stiff much higher than anything was done to his back, much higher than the original site of the trouble.

The fact that he walks with a gait that, to my mind, would hurt a painful back, a stiff kneed gait actually shows more shock. It is like taking the shock absorber off of a car. That, to my mind, indicates either that his pain is not so severe or he could make it less severe if he bent his knee so the objective findings that I see are those not consistent with trouble in the back that would give pain related to the type that he complains of and some of the complaints that he has are unexplainable on the basis of orthopedic surgery or nerve pressure.

Q. Which symptoms are unexplainable? A. Well, the fact that he had pain in both sides; the fact that he has this limitation of motion up above the area where the disease was; the fact that he appears to feel better walking with a stiff knee. All of those are inconsistent with disease in the region of the back where his trouble originally seemed to be located and where he originally received his injury.

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304 Q. What nerve comes down in between the intervertebral space of L-4 and L-5? A. The fifth lumbar dermatone.

Q. That branches out into how many roots? A. I don't know.

Q. Several hundred, doesn't it? A. I don't know.

Q. And it is perfectly conceivable, isn't it, Doctor, that one time one set of roots would be affected and another time another set of roots would be effected, depending on where the intervertebral disc, if any, was causing pressure? A. Will you state that again?

305 Mr. Savage: Will you read that, Miss Rawls?

(Thereupon, the pending question was read by the reporter.)

The Witness: No. It was present on the right side, a ruptured disc usually presses on the same portion of the right side. When it reoccurs, it presses on the same group. It doesn't come out and press once on one place and another time on another place.

By Mr. Savage:

Q. The degree of severity of pressure would definitely affect distribution, wouldn't it? A. The amount of pressure?

Q. Yes.

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308 Q. I mean it is common knowledge if you have some nerve root pressure, the trick is to get in a favorable position if you can, isn't that right? A. That is correct.

Q. And that might be sitting, it might be standing, it might be on your right side, it might be on your left

309 side, isn't that true? A. It is more likely to be on your back with your knees flexed.

Q. But it might be any one of those positions? A. It conceivably could.

Q. As a matter of fact, I believe the hospital notes indicate that this patient got more relief from lying in bed with his knees flexed? A. That is right. He was relieved by being put in a flexed position.

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310 Q. When you get spasm immediately following an injury, as there was in this case, you would regard that as an objective symptom, wouldn't you? A. I didn't see this man immediately following this injury. The first time I saw him was almost four weeks following his injury.

Q. Assuming the hospital record indicates he did have a
spasm, that would be an objective symptom, immedi-
311 ately following the injury? A. Yes, immediately
following his injury you would expect spasm and I
think from the record that this man did have spasm.

Q. That would be an objective sign at that time. A. Yes.

Q. In other words, something that he didn't have any control over? A. That is right.

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320 Q. These last X-rays were taken when? A. They were taken on the 3rd of November.

Q. 1950? A. Yes, sir.

Q. And no X-rays have been taken since then, so far as you know? A. No; none that I have had anything to do with and I don't think Dr. Troland had any taken.

Q. I believe you attempted to describe the operation. You did a bone fusion, is that right? A. Yes; I did a fusion operation using screws and bone bank bone and the patient's bone.

Q. By patient's bone, what do you use, the spinous processes? A. The spinous processes, lamina and posterior portion of the sacrum.

Q. They are the parts that extend out from the body of the vertebrae? A. Part of them do. Part of them lie rather closely.

Q. And you chisel those off, I suppose, and lay them down? A. That is correct; chopped them up in small pieces about the size of grapenuts.

321 Q. Did you make a bed for them? A. Yes; you have to make a bed for them when you take them up.

Q. Then in addition you used some bone from a bone bank? A. Yes.

Q. Where did you get that? A. From the bone bank.

Q. And how big a piece was it? A. It must be there in the notes. I don't recall that detail.

Q. In any event—— A. I used sufficient, I will say.

Q. And then you used four screws? A. That is correct.

Q. Do you drill holes first before you put the screws in? A. Yes.

Q. Do you use an electric drill for that? A. No.

Q. What do you do, curette it out? A. No, use a hand drill.

Q. And you made four holes in there, did you? A. Through the facets.

Q. To receive the screws? A. That is right.

Q. Doctor, you have referred to the hospital rec-
322 ord. You are familiar with the fact that the Medical
College of Virginia emergency room X-ray findings
show, lumbar spine, X-ray shows chipped lumbar first
transverse process on right. Did you understand that that
was the finding of the emergency room sheet? A. I re-
viewed those X-rays myself and they don't show a chip.

Mr. Preston: If the Court please, may I see what you are referring to?

Mr. Savage: Certainly. That is the one that you handed to me Friday.

Mr. Preston: This is not the X-ray report, as such, though. There is no confusion in your mind about that?

Mr. Savage: I am not confused about it, I don't think.

The Witness: May I help, I think——

By Mr. Savage:

Q. I will be glad to show you this. This is a true copy of the emergency room sheet dated December 12, 1949, on the stationery of the Medical College of Virginia, Hospital Division, Richmond, Virginia, and it is signed by the doctor, Fegan. Patent was referred to Dr. Benjamn Rawles. He is the railroad doctor, isn't he? A. He is R. F. & P. surgeon at the moment, I think.

Q. Yes. He is on their regular staff? A. Yes.

323 Q. And on the back it says:

"State of Virginia
City of Richmond

"Personally appeared before me the undersigned Maebelle O. Blanchard, registered medical librarian who, being first duly sworn on oath says that the within is a true copy of the records as shown herein."

It is signed by Maebelle O. Blanchard and then sworn to before a notary. A. May I see that?

Q. Certainly.

(Document was handed the witness.)

A. Their report is apparently a wet reading made by this Dr. Fegan, the clerk, by Robert Irbie. Dr. Robert Irbie is the intern in the emergency room and I believe if you will take the trouble to find the correct final reading by the Department of X-rays that this was not considered to be a chip. At least I didn't feel that it was a chip.

Q. But these X-rays were taken immediately following the accident? A. Yes. That is my understanding.

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328 Doctor, you found an absence of a right ankle jerk, didn't you? A. Yes.

329 Q. Which is a very positive symptom? A. Positive.

Q. Or objective symptom? A. Yes.

Q. A very important one? A. Yes.

Q. By objective, you mean something over which the patient has no control? A. Yes.

Q. You agree that Mr. Brooks at this time is unable to return to his former work? A. Yes.

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336 Q. Maybe we don't understand one another. We
are talking about the time when the examination was
made for a ruptured disc. That is the first time, in 1948.
Then the absence of a right ankle jerk would be very
337 important, wouldn't it? A. It would be very impor-
tant to me, yes.

Q. Maybe I overlooked it but would you mind showing us on this hospital record where there is any notation about the absence of right ankle jerk? This is a clinical and pathological record when he was admitted to the hospital and the operation performed June 7, 1948. A. This says record for "Retreat for the Sick." Is that right?

Q. Yes. A. He was operated at the Medical College of Virginia.

Q. What is the date of that, Doctor? A. 6-14-48.

Q. Which is the date of the original operation, isn't it? A. That is right. This is his original record. He was seen at the Medical College of Virginia but was operated on at the Retreat. This is his original operation that Dr. Troland performed on 6-14-48.

What do you want to know?

Q. Would you mind showing us in there any notation about the absence of a right ankle jerk. A. Dr. Troland's note is not in here. He must have written a direct note to
the doctor. His note is not in here. This is just the
338 intern's note. This is not a record of Dr. Troland's
findings.

Q. This is a complete hospital report, isn't it? A. No. It has no note in there by Dr. Troland that I can find. Maybe you can find it.

Q. Aren't you mistaken, Doctor? Isn't that Dr. Troland's signature there? A. That is his—I don't know this is his signature. He signed it. This is his operating note. There is no reference of his clinical findings made on the operating note. I wouldn't expect to find a note on the absence of right ankle jerk.

Q. You would expect to see it in the hospital records, wouldn't you? A. Not necessarily. Many doctors write the referring doctor a letter. I didn't have anything to do with the first entry that I think, if you will look, you will see that Dr. Troland has written a note to Dr. Rawles who is the R. F. & P. doctor.

Q. Show us on there anything about the absence of right ankle jerk. See if it is there. A. There is not note by Dr. Troland.

Q. Is there any note? A. The only person was an intern checking on the possibility of taking anesthetic. He examined him to determine whether the man was able to
339 take an anesthetic and what type.

Q. You know when they do a disc removal on a patient they do a rather complete physical examination, don't they? A. I am sure one was done but the record is not there. The record is probably on separate correspondence and if you are very interested in finding what was on that record, I think you can do so.

Q. I have here what is admitted to be the official hospital record at the Retreat for the Sick where the operation was performed. It shows the date of the operation as June 17, 1948. It shows who administered the anesthetic. It shows that there was a Dr. Jones, Dr. Troland and Dr. Stockmeyer, I think, and it is signed at the bottom on the first sheet by Dr. Charles Troland and gives the diagnosis——

The Court: I think you had better come to your question, Mr. Savage, if you have a question.

By Mr. Savage:

Q. It shows the history and examination. Whose signature is that? A. Dr. Menjes.

Q. And none of this contains anything about the absence of a right ankle jerk which you admit is a very important and objective symptom? A. What is the question?

Mr. Savage: Read it to him.

340 The Court: You are not going to read that. He asked if any of that shows anything about an ankle jerk.

The Witness: No, there is none in there that I can see.

Mr. Savage: All right.

By Mr. Savage:

Q. Dr. Rawles is a railroad doctor, is that true? I think you said he was. A. Yes.

Q. And he referred Mr. Brooks to you? A. Yes.

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343 The Court: Anything else that he would have in the way of limitation of motion or impairment of function that you can find any medical reason for?

The Witness: No, sir, other than the stiffness that he should have in his back as the result of a fusion and I think it is only fair to say that anybody who has had a fusion is going to probably have some pain. I think that it is a logical conclusion that the amount of pain is greater than I have seen following a fusion or that I have heard described following a fusion.

The Court: You mean pain forever, during his lifetime?

The Witness: Off and on with the change of the weather.

The Court: Similar to the pain of a fractured bone?

The Witness: Well, something similar I think so, yes, sir, after it is healed.

The Court: Did you find any bony union in that examination of November, 1950?

The Witness: I thought that he had sufficient union to limit his motion and he had possibly some motion but we felt he had limited motion and that was what we were aiming at, decrease motion and increase his stability and I feel at this time he probably does have a bony union. It takes almost a year's time to get a solid bone. 344

The Court: If he didn't have a bony union and there was any slipping, would that cause pain?

The Witness: Local pain at the site of the scar.

345 The Court: Nowhere else?

The Witness: No, sir. You say slipping, sir. Gross slipping I would concede, yes, but some motion, what we call pseudo-arthrosis, failure of complete solid bony fusion can give pain, but it is a localized pain, not of the magnitude that Mr. Brooks exhibits.

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The Court: And you have no opinion as to whether this pain which you think is exaggerated is due to malingering or due to some mental condition which induces him to believe he has it?

The Witness: My own opinion is that Mr. Brooks has concerned himself over a period of a year and a half. This back has been the center of his attention, and he has focused his attention on the back to the point where he probably has the feeling of pain greatly in excess of what really exists. I can't say it is voluntary or involuntary. We see it frequently where there is a continued day-to-day thought concerning arm, back, or what-not that the patient becomes so fixed on it that any sensation—you can touch the skin of his back and he is sensitive. That indicates a fixation, thinking of it so much that he is hypersensitive to anything with reference to his back or lesion, and that is my opinion; that his pain exceeds what would normally be expected.

I can't say whether that is voluntary or involuntary. I don't think anybody can. I rather doubt that it is voluntary, but that is just an opinion. 346

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350 **Benjamin W. Rawles, Jr.**, called as a witness by the defendant, was duly sworn, and was examined and testified as follows:

Direct Examination

By Mr. Preston:

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355 A. As I recall, it was, yes; and he was told to continue to wear this strapping, according to my notes, and, as I remember the details, at that time, and was told to go home and stay on fracture boards and to return and see us in one week. 356

Q. By fracture boards, what do you mean, Doctor? A. I mean just to put hard boards between the mattress and the springs, because we know that people who have complaints with their backs, due to sprained muscles or what-not, ligaments, that they are improved a lot better if they are on a firm bed.

Q. Does that mean that Mr. Brooks had a fracture, in your opinion, at that time? A. No, no, it doesn't. That is just a medical term to describe the board.

Q. Did Mr. Brooks return when you told him to? A. He returned earlier than that. He returned two days after that.

Q. What was his condition at that time? A. He said he had not improved any. In fact, he said his back had gotten worse. He was having more trouble with it than he had when he was in to see us.

Q. Did you revise the treatment at all, or what did you tell him to do? A. Since he was suffering so much more, according to his statement, we felt the best thing was to put him in the hospital where we could closely observe his treatment and be certain that he did stay at absolute rest, as we thought was indicated by his condition.

357 Q. Did you put him in the hospital? A. We had him admitted to the Retreat for the Sick Hospital in Richmond on December 15.

Q. How long did he stay? A. The same day that he returned to the office, we had him admitted that same day, and he stayed in the hospital a period of six days.

Q. Was that helpful to him? A. It was not, according to Mr. Brooks. At first, he had even greater pain, and at this time began complaining of pain extending down both legs.

Q. You say at that time he began complaining. Had he not complained before? A. He had not complained to us originally about that.

Q. Was the pain in his back continuing? A. The pain was continuing locally, and also, as I say, extending down his back.

Q. Did he have any other symptoms of significance? A. At that time, we had Dr. Troland to see him——

Mr. Savage: Doctor, your answer is not responsive. Do you mind answering his question?

Mr. Preston: Would you read the question?

(The last two questions and answers were read by the reporter.)

The Witness: Yes, he did. He complained of lack 358 of feeling from practically the hips down both lower extremities. We examined him with a pin and he stated that he had no sensation at all, a complete circumference around the thighs, on both sides, both lower extremities.

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359 A. We saw him again in the office on December 28, one week after he had been discharged. He had been directed to return at that time.

At that time, the patient said that he had improved some. His back was not bothering him as much. In the meantime, he had secured the belt support for his back that we had prescribed.

Q. Did he continue to come into your office at regular intervals? A. Following the visit on December 28, our office received a number of calls from Mr. Brooks and from 360 his wife stating that he had become worse; that his back was not any better, and requested that we prescribe something for pain, to relieve his discomfort.

Q. Did you prescribe something? A. We did, on several occasions, and we finally saw him again in the office on January 3, at which time he stated his back was still bothering him, and at that time he stated that he did not think he had improved any at all; in fact, it was his own opinion that he was worse than he had been when we had first seen him.

Q. Did you have any way of checking as to whether or not he actually was worse than when you had first seen him? A. At that time, there was a rather marked spasm of the lumbar muscles on both sides.

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365 Q. Doctor Rawles, was there a meeting of all the doctors in a group at a given time? A. Yes, there was finally.

Q. Were you present at that time? A. I was present, yes, sir.

Q. Do you have the date of that consultation? A. It was approximately five days before Mr. Brooks was operated on. The operative date was January 28. It was around January 23. I don't have the date.

Q. Did you take part in that consultation? A. I did take part in that consultation.

Q. Was there an operation which followed that? A. That is right.

Q. Were you present at the operation? A. It was present at the start. I didn't stay through the operation.

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367 Q. Have you seen Mr. Brooks since he left the hospital?

Mr. Savage: He has answered that. He said he has not.

By Mr. Preston:

Q. I didn't recall that. A. That is right, I have not. I have not seen him in my office since he left the hospital.

Q. Doctor, have you, from your observation and examination of Mr. Brooks, formed an opinion as to his condition at the time you last saw him?

Mr. Savage: Answer that yes or no.

The Witness: Yes.

By Mr. Preston:

Q. What is that opinion, Doctor?

Mr. Savage: Objected to.

The Court: On what grounds?

Mr. Savage: If it is understood that it is entirely as to the time he last saw him, which was back in 1950, I think February, 1950, then I have no objection to it.

The Court: The question was limited to the last time.

Mr. Savage: Then I have no objection to that.

Mr. Preston: That is right. The last time. I mean just your examination and observation and so forth of the patient.

368 The Witness: My observation as to the type of trouble he was having?

By Mr. Preston:

Q. That is exactly right, Doctor.

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A. It was my feeling that this man, of course, had received some trauma to his back, but I felt very strongly that his complaints were far out of proportion to the evidence of local injury that we were able to see.

Q. Will you explain how you arrived at that conclusion, Doctor? A. Well, there were a number of things that caused me to arrive at that conclusion. First, I have never seen anybody with an injured back that did not improve on rest, and this man, at first he said he was a little better, but then he said he was getting worse and worse in spite of the fact that he had been at absolute rest on the firm bed which is the accepted treatment, as we mentioned earlier, for injury of this type.

Another thing that caused me to wonder about this man, he, as I mentioned earlier, he had anesthesia, lack of sensation in both lower legs. There is no nerve distribution that could possibly have explained that finding. In other words, the nerve pattern is so patchy that you cannot get a circular loss of sensation in any part of the body explained on the basis of a single injury.

Another thing that made we wonder, too, he also
369 told me, in conversation, that he had been very
nervous since he had been in the service, and I thought very definitely that certainly in the patient's mind his symptoms were probably aggravated.

Q. Did you examine any X-rays of Mr. Brooks' back? A. I did, yes.

Q. Did you examine X-rays that were taken immediately upon his arrival in Richmond on December 13, 1949? A. I did. X-rays were made at the Medical College of Virginia the night he was received.

Q. Did you take a look at those? A. I did. I particularly looked at them and particularly checked about them, because Mr. Brooks brought up the question that he had been told that he had a fracture, and he brought that up after I had told him that Dr. Troland had told him, both of us together, that there was no injury of a fracture, so I particularly checked about them the second time to ascertain whether there had been some error in the reading of the films, but the report was the second time that we rechecked, and there was no evidence of a fracture in the lumbosacral or sacroiliac region of his back.

* * * * * * * * * *

373 Q. The original diagnosis at the Medical College of Virginia Hospital was a chipped fracture of the first lumbar vertebra, a transverse process on the right, isn't that correct? A. That was the diagnosis made by the intern who saw him in the hospital, that is right.

374 Q. Immediately following the accident? A. That is right, sir.

* * * * * * * * * *

376 Q. Doctor, the inference has been drawn here that the man who saw these films could not get a very

clear picture because the films were wet. If the patient was admitted at 10:05 and discharged at 11:30, the films would have had ample time to dry, isn't that right? A. Yes, they could have dried in that time.

Q. So the wet films have no significance at all in this picture, isn't that right? A. I will agree with you about that.

* * * * * * * * * *

383 A. As I recall, he was confined, he was operated on on January 28 and was discharged some time, I imagine, around the latter part of February.

Q. Of 1950? A. 1950.

Q. So that from February of 1950 to the present time you haven't seen Mr. Brooks professionally at all. A. No; professionally I have not.

* * * * * * * * * *

391 Mr. Preston: I offer in evidence, by agreement with Mr. Savage, two sheets labeled Inspector's Train Report and ask that they be marked.

(Two Inspector's Train Reports were marked Defendant's Exhibits 4 and 5 and received in evidence.)

Mr. Preston: I have here two Inspector's Train Reports. I will read them to you because they are very brief.

"ACL Engine No. 307 north; Train No. (blank). Time arrived 9:25 a.m.

"Engine No. (blank); Train (blank); Time departed (blank).

"Number of cars in train: 65 slow cars.

"Number of cars forwarded with inoperative brakes: (blank).

Number of cars in bad order: 2.

"Inspection began 9:25 a.m.; inspection completed 10:20 a.m."

This is signed "W. E. Ponton, December 12, 1949."

Then under here we have a little schedule:

"Bad order cars, initial number defects of car; shop 2."

We have two cars listed there; DLW 47949 with the notation "XB".

Under "Defects of car:" "Air brake inoperative", and, under "Shop:" Two, Acca.

392 The second car is PRR indicating Pennsylvania Railroad 69094, XB; running board decay, shop 2, Acca.

The Court: You will have to interpret that.

Mr. Preston: We will. We have one of the inspectors here this morning who will tell exactly what was done but I want the jury to understand what this particular report is.

There are three names in the lower part, W. G. Fryer, East Side; M. T. Parrish, West Side, and W. E. Ponton, tops, and the notation beside that, "air brake test."

I have another inspection report and this starts off "R. F. & P. No. 1103 north."

"Train No. (blank); arrived 11:25 a.m.; Engine No. (blank); Train No. and time departed; Number of cars in train, 111.

"Number of cars forwarded inoperative (blank); O.K. Number of cars in bad order (blank).

"Inspection began 11:35 a.m. Inspection completed 12:15 p.m."

The inspector who signed W. E. Ponton; dated December 12, 1949.

The same form is used and there is "bad order cars" here but there are no cars listed under that and the notation appears on it, "4 pounds air leakage per minute".

Underneath that are three names again, as a matter of fact the same three names under "H" Fryer, meaning the head, "Fryer; "C" for Center, Ponton; and
393
"R" is Parrish and the notation appears on there "testing brakes".

The Court: Is there any stipulation that this relates to this particular train?

Mr. Preston: Yes.

The Court: I wanted to know that because unless there is a stipulation or testimony all of this is meaningless.

Mr. Preston: I have testimony available.

The Court: I didn't know what was coming and I thought before you overlooked I had better mention it.

Mr. Preston: Thank you, if the Court please. I have testimony this morning.

The Court: All right.

Mr. Preston: Mr. Savage agrees that the two double sheets which I have now may also be offered in evidence. Will you mark them separately?

(R. F. & P. Locomotive Inspection Reports were marked Defendant's Exhibits 6 and 7 for identification.)

The Court: They will be received.

(Defendant's Exhibits 6 and 7 previously marked for identification were received in evidence.)

Mr. Preston: I have here two papers, actually double sheets labeled "Richmond, Fredericksburg & Potomac Railroad Company Locomotive Inspection Report." These are somewhat longer than these other two but, as 394 you can see, there are a great many blank spaces on here and I will not go ahead and read all the parts which do not apply to our situation.

However, the dates and times and some of the notations are particularly important and very material to our case.

I will start here:

"Locomotive initial, R. F. & P. 1103, 1153, 1104, 1154; Time started 5:39 a.m.

"Arrived at yard 5:39 a.m.; time 6:20 a.m.; date 12-12-49" and I think we can agree that that is December 12, 1949.

Here is a large blank space under the schedule headed "Repairs needed". This says "Repairs needed" here. It says "Repairs made by" and that is entirely blank and I want to note that within that schedule there are separate parts for machinery, boilers and strippings, cams, air brakes and tightening, headlight, cab lamp, motor, generator, electric control.

All those classifications here under "Repairs needed" (blank).

This is at 6:30 a.m. on the morning of December 12.

Of course, under the next column, which is "Repairs made", that is also blank.

On the lower part of the right-hand side of the first page is a part here that says "Brakes—O.K.", is the notation. I think the other notations on there are not material to our problem at this time.

395 There are other parts of the engine. There is main reservoir pressure, 130; brake pipe pressure, 70 pounds.

This is signed with the engineman's signature, J. R. Campbell and G. W. Childress. It is also signed,

"The above work has been performed except as noted and the report is approved."

That is signed "Lipscomb, foreman."

The second page is a similar page with a similar schedule, "Repairs needed; repairs made by" (blank) and signed "Butler, motor rail car maintainer".

Below that "Inspection and repairs made". There are four portions here of which I think you are concerned with only one. "Compressors and all other air equipment tested by me and are in good condition and in compliance with the law."

That is signed "Butler, air inspector." And again Mr. Lipscomb signs this sheet:

"The above work has been performed except as noted and the work approved. Ready for service; 10 a.m., 12-12-49" over the signate of Mr. Lipscomb, foreman.

On the back of this sheet, "State what defects found" (blank); "repairs made by" is, of course, also blank.

That is on the morning of the 12th and the final notation is here 10 a.m. on the morning of December 12.

I have here a second locomotive inspection report
396 but I will ask you to note particularly the portion
which I will read to you first because that is the date

and the time. This actually is the inspection report when this locomotive returned back to Richmond. "Locomotive initial R. F. & P., Locomotive No. 1106, 1156, 1103; dated 12-13-49; time arrived at terminal, 3:17 a.m.; arrived at pit 3:55 a.m."

Again under the schedule "Repairs needed" which is just exactly the same as on the other one, "Repairs made" and all those classifications, all blanks, indicating no repairs were needed.

Again, over in the lower left-hand portion under the part "For brakes: O.K."; "Main reservoir pressure, 130; Brake pipe pressure, 70 pounds."

This is signed Fireman R. B. Kirbie and the Engineman's signature, C. J. Kelly. That is when the train returned back to Richmond and again signed by Mr. Lipscomb, the foreman.

We have again the second sheet and again it is blank so far as repairs needed is concerned and, of course, repairs made by is also blank. Again Mr. Butler signs and he signs also at the bottom, "Inspection and repairs made in the roundhouse; compressor and all other air equipment tested by me and are in good condition and in compliance with the law, Butler, air inspector", and the final notation at the bottom of this sheet:

397 "The above work has been perforomed except as noted and report is approved ready for service 10 a.m., 13-12." That is the date following and again Mr. Lipscomb signs as the foreman.

Mr. Preston: Will you call Mr. Hall, Please?

Thereupon, **John Wesley Hall, Jr.**, was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

Q. Mr. Hall, will you give us your full name and residence address? A. John Wesley Hall, Jr., 1200 Beechtree Boulevard, Richmond 26, Virginia.

Q. By whom are you employed, Mr. Hall, and in what capacity? A. By the Richmond, Fredericksburg & Potomac Railroad Company as assistant trainmaster.

Q. Have you been notified that you are to be promoted to trainmaster? A. I have, yes, sir.

Q. On what date will you be trainmaster of the railroad? A. July 1

398 Q. How long have you been with the R. F. & P.? A. Since June 17, 1916.

Q. 1916? A. Yes, sir.

Q. In what capacity have you worked in the past for the railroad? A. Call boy, clerk, crew dispatcher, yard master, general yard master, terminal trainmaster, superintendent of Potomac Yards and assistant trainmaster.

Q. Would you describe briefly the duties of the assistant trainmaster and the trainmaster, I assume is more or less the same. A. He has supervision over all the men employed on the trains to see that they carry out the rules and are familiar with their duties; has charge of the operation of trains and movement of cars.

Q. Mr. Hall, I ask you just simply what this two-sheet piece of paper is?

The Court: Is that some exhibit?

Mr. Preston: Yes.

The Court: One that has been received.

Mr. Preston: No, sir, it has not been received yet.

The Witness: It is a switch list for inbound ACL train delivered to the R. F. & P.

The Court: Have it marked for identification.

399 What is ACL, Atlantic Coast Line?

The Witness: Atlantic Coast Line, yes, sir.

The Clerk: That is Defendant's Exhibit No. 8.

(Switch list for inbound ACL train delivered to R. F. & P, was marked Defendant's Exhibit No. 8 for identification.)

The Court: What is that, Atlantic Coast Line cars?

The Witness: It is a switch list for ACL cars in the train.

The Court: You pick up the Atlantic Coast Line cars at Richmond?

The Witness: They are delivered to the R. F. & P. at Richmond.

Mr. Savage: What is the purpose of this? If your wheel report shows it on the outgoing inspection, what is the purpose of this?

Mr. Preston: The incoming inspection included especially the inspection of the journal boxes on arrival and I can show they were inspected a very, very short time after the train arrived.

Mr. Savage: You have a subsequent inspection to that. I don't see that it is relevant.

Mr. Preston: Do you object to it, Mr. Savage?

The Court: What is it? I didn't hear you.

Mr. Preston: I have just showed this to Mr. Savage and
asked him if he objects to the admission of this
400 paper in evidence.

Mr. Savage: We have an inspection later than this. This shows an inspection of incoming cars. If you really want it, I won't object.

Mr. Preston: It is very simple, Mr. Savage.

The Court: It may be simple to you but I don't know yet what it is all about because you have not gone far enough along.

Mr. Preston: I think Mr. Hall can help us on this.

By Mr. Preston:

Q. Mr. Hall, will you look at that sheet and tell me, first, whether cars NF 31918 came into the Acca yard on Atlantic Coast Line Train 307?

The Court: Acca yard? Now what does that mean?

Mr. Preston: That is the name of the yard, like Potomac Yard is the one across the river. Acca, A-c-c-a is the name of the freight yard in Richmond.

The Witness: 31918, yes, sir.

By Mr. Preston:

Q. In other words, this sheet indicates that the particular car which we are concerned with, which I described by number to you, arrived in Acca. Can you tell me the time and date when it arrived, from this sheet? A. 9:20 a.m. December 12, 1949.

The Court: Let me see it.

401 (The document was handed the Court.)

The trains on the Atlantic Coast Line reaching Richmond go then into some yard, the Acca Yard, and are they then transported from Richmond to Washington over the R. F. & P. lines? Is that right?

The Witness: That is correct, yes, sir.

The Court: You see we don't know all about this. I don't and I don't think the jury does.

Mr. Preston: No. If the Court please, I can bring it out by Mr. Hall.

The Court: If you would bring it out that way, it would be more intelligble to us who don't know about it; and this is designed to show that the car that had the hot box came into the Acca Yard at a certain time?

Mr. Preston: At 9:20 on the morning of December 12 on Atlantic Coast Line Train No. 307.

The Court: Is that correct, sir?

The Witness: Yes, sir, Extra 307.

The Court: All right.

By Mr. Preston:

Q. Mr. Hall, how far is it from Richmond to Washington? A. 114 Miles.

Q. That would be 228 miles round trip, isn't that correct? A. That is correct, yes, sir.

402 Q. Can you tell me in December of 1949 approximately how many round trips a week a brakeman was making on the R. F. & P. Railroad?

Mr. Savage: Objected to.

The Court: Sustained. You can ask about Mr. Brooks.

By Mr. Preston:

Q. Have you any record which would indicate how many trips Mr. Florence would have made or did make in December, 1949?

Mr. Savage: Objected to.

The Court: Mr. Florence?

Mr. Preston: Mr. Florence. He was the flagman up at the head of the train or the brakeman.

Mr. Savage: I don't see the relevancy of this.

The Court: I don't either.

Mr. Preston: If the Court please, he testified he traveled 35,000 miles a month in his duties as a brakeman and this is in impeachment—

Mr. Savage: We concede that is an error. That should be 3,500 miles.

Mr. Preston: I withdraw the entire line of questioning, Mr. Savage.

Mr. Savage: And this will save a lot of time.

By Mr. Preston:

Q. Mr. Hall, to get to another subject, do you know

403 Mr. Bowie who is an engineer on the R. F. & P. Railroad? A. Yes, sir.

Q. What are his initials, if you know? A. W. N.

Q. Can you look at Defendant's Exhibit No. 2 and tell me whether Mr. Bowie, the one that you mentioned now, was the engineer of extra 1103 north? A. Yes, sir; Mr. W. N. Bowie.

Q. What is Mr. Bowie's present condition of health, Mr. Hall? A. Mr. Bowie was taken sick around the 1st of April, 1950—

Mr. Savage: Mr. Preston, we can save an awful lot of time. If you say he is sick and that is the reason you haven't brought him here, I will take your word for it.

Mr. Preston: I am very pleased, Mr. Savage. He is very ill and paralyzed.

The Witness: He has retired.

The Court: I think it is very proper for Mr. Preston to offer that evidence so that the jury may not infer that their failure to produce him—

Mr Savage: I will be very happy to concede that.

The Court: Very well.

By Mr. Preston:

Q. Am I not right, Mr. Hall? A. Mr. Bowie has retired, yes, sir, and he is paralyzed and has lost his speech. 404

Q. Lost his speech, you say? A. Yes, sir.

Q. Mr. Hall, in your testimony a little while ago you mentioned that, in the course of your duties on the railroad, you have become familiar with the rules and regulations for the train crews, is that correct? A. I am required to be familiar with them, yes, sir.

Q. Can you tell me if there is any rule which specifically requires the engineer of a train to bring it to an immediate stop if he sees a sticking brake?

Mr. Savage: I think that was admitted and it has been admitted all along by the defendant's witnesses. Is he trying to impeach his own witness or corroborate—

Mr. Preston: I didn't understand it had been admitted, I am delighted if it is. I am sure Mr. Hall can establish it if it is not.

The Court: He didn't say it was admitted by the plaintiff's witnesses. He said it was admitted by the defendant's witnesses.

Mr. Preston: Is that admitted, Mr. Savage?

Mr. Savage: It is contended by the plaintiff—go on and ask the question.

By Mr. Preston:

405 Q. Is there any rule which requires the engineer to bring the train to an immediate stop if he sees a sticking brake? A. No, sir.

Q. Is there any rule which would require him to bring it to a stop immediately if he sees a hot box? A. Not immediately, no, sir.

Q. What rule does govern your situation, Mr. Hall? A. You mean a specific rule?

Q. Yes. Do you have a rule which covers this situation? A. We have a rule that the safe course must be taken at all times and if, in the judgment of the engineman, why he thinks that it is not safe he should stop.

Q. But if he does not believe it is not immediately dangerous, he is not required to stop, is that correct? A. That is correct, yes, sir.

Mr. Preston: I believe that that completes my point that I want to cover on direct examination with Mr. Hall.

You may cross-examine, Mr. Savage.

Cross-Examination

By Mr. Savage:

Q. Mr. Savage, a number of R. F. & P. witnesses testified they understood there was a rule requiring immediate stop if they saw there was a sticking brake or hot box—

406 Mr. Preston: I object to that and I don't believe that is correct.

Mr. Savage: The jury knows that is true. I think it is proper cross-examination.

The Court: I just don't recall that part of the testimony. Perhaps we had better check it up and find out.

Mr. Preston: I think Mr. Savage's question was directed at the question of—

Mr. Savage: I will withdraw the question.

Mr. Preston (continuing):—of the hot box alone.

By Mr. Savage:

Q. Mr. Cunningham testified that he was the conductor of this train and upon the discovery of a hot box or sticking brake, the engineer was required to stop a train. Was he wrong about that?

Mr. Preston: I don't believe he so testified.

Mr. Savage: You may look at the record.

The Court: Yes, check it up.

Mr. Preston: I am doing so and I object to the question for that reason.

May I suggest you look at page 219, Mr. Savage, in your cross-examination of Mr. Cunningham.

Mr. Savage: Thank you.

Mr. Preston: I believe your question was directed solely to the hot boxes and not to sticking brakes.

407 Mr. Savage: There are other witnesses who testified as to sticking brakes.

Mr. Preston: I don't believe so. I started through this testimony at 5 o'clock this morning, Mr. Savage, and I didn't find it.

By Mr. Savage:

Q. Your understanding is that if a hot box develops the engineer is required to stop, is that correct? A. Will you amplify that question a little, Mr. Savage?

The Court: If you can't answer, say so.

The Witness: If the engineman knows there is a hot box and feels there is danger, he is required to stop.

By Mr. Savage:

Q. You leave it entirely to his judgment and discretion? A. The conductor and engineman are both responsible for the safety of the train and it is left to their judgment as to whether it is considered safe or not.

Q. How can you tell the differences between a hot box and a sticking brake?

Mr. Preston: I object to the question because I am not sure Mr. Hall is qualified on that point.

Mr. Savage: A trainmaster and a yardmaster is not qualified?

408 Mr. Preston: If he can give an opinion—

The Court: If he can't, he can say so.

The Witness: There are times that it is hard to distinguish between a hot box and a sticking brake. There are other times that it can readily be detected.

The difference in the color of the smoke and whether the smoke is on both sides of the train or one side and with a sticking brake, you will be apt to see smoke on either side of the train at the same time. There are other cases that it will only show on one side.

By Mr. Savage:

Q. There are times when a hot box will develop smoke on both sides, isn't that right? A. There are times that the smoke from a hot box will be seen on both sides if the direction of the wind is right.

Q. Such as happened in this very case? A. I can't answer that question.

Q. You don't know that. You don't know, as a matter of fact, that Mr. Reid, the assistant road foreman of engines said that his attention was called to this smoke on the one side of the train and he waited until they got to a right-hand curve so he could see it himself on the other side? You don't know that? A. I have not heard Mr. Reid's testimony.

Q. I didn't ask you that question. I asked you—

409 The Court: You asked him if he knew that was so in this case. Now, he can't know it unless he was there.

If you ask him whether somebody told him, I think that would be a little fairer to the witness.

Mr. Savage: I think perhaps Your Honor is right about that. Thank you.

By Mr. Savage:

Q. Do you know that, as a matter of fact, outside of the testimony in this case? A. No, sir, I do not.

Q. You mean you haven't talked to Mr. Reid about this case? A. I haven't talked to Mr. Reid about the case in any specific instances, no, sir.

Q. Aren't you interested in your capacity as an official of the R. F. & P. in knowing the cause of accidents? A. Yes, sir, I am.

Q. In that capacity, didn't you feel it incumbent upon yourself to discuss this with Mr. Reid and find out the cause of it? A. I didn't investigate the case with Mr. Reid.

Q. What was your official capacity with the railroad on December 12, 1949? A. Assistant trainmaster.

410 Q. Mr. Reid was directly under your control and supervision, wasn't he? A. While on the trains, he is, yes, sir.

Q. This accident happened while he was on the train. How long is a car, the average freight car?

You understand my question, don't you?

A. I didn't understand you, no, sir.

Q. I beg your pardon. How long is the average freight car? You know that, don't you. You know of your own knowledge, with all your years of experience? A. They will will run from 38 to 65 feet.

Q. Yes. Will you tell us and we would like to know this, how it is possible for anyone to tell whether or not you have got a sticking brake or hot box approximately a half a mile away, particularly when you are on the front of the train and not on the rear and you are moving at approximately 50 miles an hour? A. There are instances when it can be determined.

The Court: That is not responsive. He asked you how, as I recall it.

Will you read the question, Miss Rawls?

(The pending question was read by the reporter.)

The Witness: It is possible for anyone to tell if they see smoke—

By Mr. Savage:

Q. Won't you please answer my question?

411 The Court: Do you want it read back to you?

The Witness: I think I understood the question, Your Honor, but the question was how it is possible for anyone to tell. Is that correct?

By Mr. Savage:

Q. Whether it is a sticking brake or a hot box, that is the question, at the distance and speed I have mentioned. It is a very simple question. A. The condition of smoke or the color of the smoke, if it can be seen, would be the way of determining it.

Q. It would be very difficult, wouldn't it, under those circumstances? A. I don't think that I could answer that question.

Q. Why? It wouldn't be the fact that you are going to be promoted July 1 which would keep you from answering the question, would it?

Mr. Preston: I don't think that is fair. I don't think it is relevant.

The Court: I think it is.

The Witness: That would have no effect on it, no, sir.

By Mr. Savage:

Q. Why won't you answer the question? A. Your question was that it would be rather difficult—

Mr. Savage: Read him the question, Miss Rawls.

(Thereupon, the pending question was re-read by 412 the reporter.)

The Witness: The only way that it could be determined would be if the smoke was visible to the extent that it was on both sides of the train, as I stated previously. If the smoke was blue it would be considered as a sticking brake. It is not possible to tell absolutely whether it is a sticking brake or a hot box under those conditions.

By Mr. Savage:

Q. That is a fair answer and it is exactly what I thought. Now, will you tell us about that previous rule that in case of doubt, what are you supposed to do? A. The safe course must be taken.

Q. Sure. So, if you had been operating this engine and you saw smoke coming from both sides a half a mile away and you were moving approximately 50 miles an hour and you knew that it was very difficult to tell whether or not it was a sticking brake or a hot box and you knew the rules required you to stop if you had a hot box, you would have stopped, wouldn't you? A. I didn't say that the rules required an immediate stop. I said that it was left to the judgment of the conductor or the engineman as to whether it was considered safe.

Q. But if the hot box was sufficiently hot to produce fire
and smoke from both sides of the train, that would be
413 a very dangerous condition, wouldn't it? A. Yes, sir,
it would.

Q. And under those circumstances, you would certainly obey the rule and stop had you been operating the engine, wouldn't you? A. Mr. Savage—

Q. Just answer the question, please.

The Court: He started to answer it.

The Witness: I have never operated an engine and I didn't say that the rule required an immediate stop.

By Mr. Savage:

Q. But you did say that in case of doubt the safe course must be taken and you have admitted that this was a very dangerous condition. Do you mean to tell us then that even though this was a very dangerous condition and, in view of the rule you have just enumerated, you would have continued on with the train with a blazing hot box with a carload of paper? Answer that yes or no. A. I don't think that I can answer that yes or no.

The Court: Answer it whichever way you can.

The Witness: I have not said or have heard it said previously that there was a blazing hot box.

By Mr. Savage:

Q. Assume that to be a fact and answer the question.

The Court: Where is the evidential basis for that?

414 I thought there was smoke.

Mr. Savage: And fire flying.

The Court: I don't remember any evidence of fire flying; smoke emanating from about midway of the train on both sides.

Mr. Savage: I want to be fair with the witness.

By Mr. Savage:

Q. You have said the rule requires him to take a safe course in case of doubt. Since there was a condition that was dangerous and since it was very difficult, if not impossible, to tell whether or not it was a hot box or a sticking brake a half a mile away with the train proceeding at 50 miles at hour when the person determining whether it was a hot box or sticking brake was on the front of the train, then I ask you whether or not, under those circumstances, had you been operating the engine you would have not brought the train to an immediate stop?

Mr. Preston: I object to the question, Your Honor, as being multifarious and unless he puts it in a hypothetical form, why I don't believe the question is possible to follow, much less to answer.

Mr. Savage: You tell me one thing in that question that is wrong and I will correct it as I did with your hypothetical question.

The Court: I sustain the objection and ask counsel to reframe it as a hypothetical question.

415 By Mr. Savage:

Q. Mr. Hall, I ask you to assume the following facts as true:

That on December 12, 1949, a four-unit Diesel was proceeding from Richmond to Potomac Yards with 112 cars, including the caboose;

That smoke was seen somewhere near the middle of the train;

That this smoke came from both sides of the train;

I ask you whether or not, under those circumstances, the person operating that train should have brought it to a stop, an immediate stop as soon as the smoke was discovered coming from both sides of the train? A. No, sir.

Q. He should not have? A. There is no rule that would require him to do it.

Q. Mr. Hall, won't you please answer my question?

Mr. Preston: I believe that the witness did answer the question just as concisely as possible.

The Court: I sustain the objection.

By Mr. Savage:

Q. I didn't ask you whether or not there was a rule requiring him to stop. I asked you whether or not he should not have stopped under the circumstances. A. Not necessarily, no, sir.

416 Q. What do you mean by "not necessarily"? A. There are instances where trains which had sticking brakes that, if the engineman made a brake reduction on the engine and then released the sticking brake would release and it would not be necessary to stop.

Q. I think you are a hundred percent right but at half a mile away, you said that it would not be possible to tell whether it was a sticking brake or a hot box. Tell us if you couldn't tell or if the engineer couldn't tell whether it was a sticking brake or a hot box but he did know that there was sufficient smoke to come from both sides, which you have described as a dangerous condition, whether or not under the circumstances he could not have brought that train to an immediate stop?

Mr. Preston: I object to the question on the same ground, if the Court please, as the other just proceding the hypothetical question. It is too mixed up in my way of thinking between facts to be assumed and facts that may or may not be in evidence.

The Court: Overruled. If the witness doesn't understand, I will ask him to say so. If you understand the question, you will answer it.

The Witness: I would say that the engineman might not know definitely whether it was a sticking brake or a hot
box. If he applies his brakes and released them and
417 the brake did not release, why then it might be assumed that it was a hot box, in which case he should stop.

By Mr. Savage:

Q. Immediately? A. Yes, sir.

Q. I understood you to say that your understanding of the rule is that, upon discovery of a hot box, you are supposed to bring your train to a stop, is that correct?

Mr. Preston: I object to the question because I do not think the witness testified to that at all.

The Court: He is asking him. Overruled.

You may answer.

The Witness: If it is known that there is a hot box, the train should be stopped.

By Mr. Savage:

Q. But that same rule does not apply to sticking brakes? A. No, sir.

Q. I show you a book entitled "Richmond, Fredericksburg & Potomac Company; Timetable No. 112; in effect 12:01 a.m. Sunday, April 24, 1949", stating, "For the government of employees only", and at the bottom there is typed, "W. A. Aiken, Jr., General Superintendent", and call your particular attention to page 46, Instruction 114 and ask you what it is?

418 Mr. Preston: Mr. Savage, are you going to offer this in evidence?

Mr. Savage: Yes.

Mr. Preston: I would like to see it.

Mr. Savage: Certainly. I thought you had a copy in your file.

Will you identify it, please, and then I will show it to counsel? What is it?

The Witness: It is an R. F. & P timetable with instructions.

The Court: So there won't be any doubt of it, mark it for identification.

Mr. Savage: We offer it for identification.

The Court: Just mark it for identification.

(Timetable of R. F. & P. with instructions was marked Plaintiff's Exhibit No. 3 for identification.)

The Court: It is hardly your time to offer it, but, if you want to use it in cross-examination, it can be marked for identification.

By Mr. Savage:

Q. Will you tell us what that rule is?

The Court: The rule speaks for itself, doesn't it?

Mr. Savage: I thought I would save a little time.

Mr. Preston: Mr. Savage, if you are going to read 419 this in evidence now that is one thing. How are you going to use it, please?

The Court: If you just stop a minute, maybe we would find out. I don't know how he is going to use it.

Mr. Preston: All right.

By Mr. Savage:

Q. Are you familiar with Rule 114? A. Yes, sir.

Q. Are you familiar with this part of Rule 114:

"The following signals"—

The Court: I will not let you read that in evidence
420 at this time. You may ask him whether he wants to
change his testimony in the light of that rule and
then, at the proper time, you may offer the rule.

By Mr. Savage:

Q. Do you wish to change your testimony in the light of that rule?—and I will call your attention to the last paragraph of it. A. No, sir.

Q. Does that rule mean—or what does it say? What is your understanding of it? A. That is a rule to govern persons observing passing trains.

Q. What does it say as regards to sticking brakes? A. That if any dangerous condition is noted, they will give a stop signal. That is the person on a train or standing on the side of the track, one on a passing train or someone around the station that a train passes through. If they observe any condition that is not safe, they should give a stop signal.

Q. Doesn't that state, the first part of it, "The following signals will be used when other signals are not required"?

Mr. Preston: Mr. Savage, will you let Mr. Hall see
421 that as you read it?

Mr. Savage: I think he knows it. I will be glad to do that though.

Is that correct?

The Witness: That is correct; yes, sir.

By Mr. Savage:

Q. Do you have any other signal than this for a sticking brake? A. There is no other signal prescribed by rule, for anyone who observed a sticking brake on a passing train. There is no other signal provided except a stop signal. That is solely for persons observing the train passing.

Mr. Savage: If your Honor please, I feel at this time we are entitled to offer this in evidence to see how far it does contradict the testimony of the witness.

The Court: If there is no objection, you may offer it, but it is not your time of course.

Mr. Preston: I object to it, if the Court please.

The Court: I mean you are not in rebuttal. This is the defendant's case going on.

Mr. Savage: I understand that.

I permitted you to bring in a lot of reports and I could have made you produce the inspector to come in, and I think I am entitled to the same courtesy.

422 The Court: I will let you offer it at your time and then, if necessary, I will let you recall this witness to cross-examine him further on it, but if there is an objection on it, I have to follow the rules.

Mr. Preston: I feel I must object to this at this time, if the Court please, and I do so object.

The Court: You object to the reception in evidence of this book?

Mr. Preston: I do.

The Court: Or this rule, at this time?

Mr. Preston: I do, if the Court please.

The Court: The objection is sustained. It may be offered when the plaintiff puts in his rebuttal and this witness will remain so he can be recalled for further cross-examination, if necessary, in connection with it.

Mr. Preston: Very well.

The Court: Is that agreeable to you, Mr. Savage?

Mr. Savage: Yes, Your Honor.

The Court: Very well.

By Mr. Savage:

Q. What is the reason for your understanding of the rule requiring trainmen observing sticking brakes to give a stop signal? A. Are you referring to that rule about the inspection of passing trains, Mr. Savage?

423 Q. That is right. A. Well, the only way that they could convey a message to the crew on the train would be to give a signal and, if it is thought it is a dangerous condition, a stop signal is required.

Q. But, Mr. Hall, this does not say anything as to whether or not it is a dangerous condition or not. Your statement before was that if somebody or some train crew observed a passing train with a sticking brake, they are supposed to give a stop signal. A. That is correct.

Mr. Savage: I think that is all.

Mr. Preston: I have no redirect, if the Court please.

The Court: The Court would like to ask you a few questions, Mr. Hall.

Do I understand that when smoke seen emanating from a freight car, it may indicate one of two things; namely, a hot-box or a sticking brake?

The Witness: That is correct; yes, sir.

The Court: And the only method of determining which it is, is the color of the smoke; the sticking brake showing a yellow smoke?

The Witness: Blue.

The Court: Blue; and the hot-box a yellow smoke?

The Witness: Yellow or gray.

424 The Court: And the other method is by observing whether the smoke comes from both sides of the train. If it comes from both sides of the train, it is indicative of a sticking brake but, from one side, a hot-box?

The Witness: There are instances, sir, when the wind would blow the smoke to the other side of the train.

The Court: I understand, but that distinction is indicative?

The Witness: That is correct; yes, sir.

The Court: Do I understand that the approved method of dislodging a sticking brake—is that what you call it?

The Witness: Releasing it.

The Court: —releasing a sticking brake, is to slow the train down and then start it up again?

The Witness: To apply the brakes from the engine and then release them.

The Court: Doesn't that do that?

The Wintess: That does slow the train; yes,sir.

The Court: And it starts up again?

The Witness: Yes, sir.

The Court: Does the jerk in the change of speed cause the sticking brake to become dislodged?

The Witness: No, sir. Applying the brakes on all of the cars in the train and then releasing them, when they are released, why, frequently that brake that had been sticking previously will release.

425 The Court: I see. After that is done and smoke continue to emanate from the car, doesn't that indicate that it is a hot-box and not a sticking brake?

The Witness: Not in all cases. It might indicate a hot-box; it might indicate that the sticking brake failed to release.

The Court: Then what would good railroading require?

The Witness: To stop and inspect it.

The Court: Could you dislodge or release a sticking brake after a stop?

The Witness: Yes, sir.

The Court: And you could take a car with a hot-box out of service if you found the hot-box, or is there a way of putting the hot-box car back in operation without taking it out of service?

The Witness: It would depend on the condition of the hot-box. It could be packed and oiled and continued there.

The Court: Depending entirely on the condition?

The Witness: Yes, sir.

The Court: And after the engine man slows down and starts up, with the view of loosening a sticking brake, the only way he can determine that that has been done is by observing that no more smoke comes from the car; is that correct?

426 The Witness: That is correct; yes, sir.

The Court: And if more smoke continues to come, either the brake is still stuck or it is a hot-box?

The Witness: Yes, sir.

The Court: And the reason for slowing down and starting up again to loosen the sticking brake is to avoid the loss of time that is involved in coming to a complete stop; is that it?

The Witness: Yes; to avoid the necessity for stop if the condition can be remedied.

The Court: And that is loss of time?

The Witness: Yes, sir.

The Court: Anything further?

Mr. Savage: Just one or two questions.

Recross Examination

By Mr. Savage:

Q. Of course, assuming that the waste in the hot-box was on fire, that the axle was cherry-red, that car could not have been used at that time even by repacking, could it? A. No, sir; not at that time.

Q. And to have proceeded further with that car in the train, assuming you had a carload of paper, would have been highly dangerous, wouldn't it? A. Yes, sir.

427 Q. Had you been on the engine and your attention had been called to smoke coming from your side, would you have proceeded further with that train until you reached a righthand curve so you could have observed both side? A. If I I had been on the engine, that would have depended on how far the curve was from the point at which I was located.

Q. But realizing the necessity of a prompt stop, you would have taken the safe course?

Mr. Preston: If the Court please, I don't think his hypothesis takes into consideration that prompt stop under those circumstances. My understanding of this question was on that assumption that he did not know what was the condition except that there was smoke.

Is that fair, Mr. Savage, or not?

Mr. Savage: I think we will let the Court rule on it. I think it is proper cross-examination.

The Court: Read the question, Miss Rawls.

(Thereupon, the pending question was read by the reporter.)

The Court: I overrule the objection. I don't believe the answer will mean very much, however.

Mr. Savage: What is your answer, Mr. Hall?

The Court: Of course, he would have taken a safe course.

The Witness: I believe, sir, that I answered that
428 question.

The Court: Would you have taken an unsafe course?

The Witness: No.

The Court: Of course not.

The Witness: I think my answer was that I would have taken a safe course.

Mr. Savage: No further questions.

Mr. Preston: I have no further questions.

The Court: Stand down, but remain in the corridor, for you may be recalled.

Mr. Preston: Call Mr. Parrish, please.

The Court: The reason I interrupted on that last question, I think one of the issues in this case is what is a safe course.

Mr. Savage: I appreciate that, and I think the question, in the absence of the rule, would have been silly, but, in the light of the rule, I think it was proper. In other words, I think the question is not sillier than the rule.

The Court: The issue, what is a safe course, for the witness to say he would have taken the safe course is a conclusion, as I see it.

Thereupon **M. Thomas Parrish**, called as a witness
429 by the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * * * * * *

431 Q. When you pulled up the lid, did you do that on each journal box? A. Yes, sir.

432 Q. On your side of the train? A. Yes, sir.

Q. You never missed one? A. No, sir; I didn't miss them. Some few of them didn't have any lids.

* * * * * * * * * *

439 By Mr. Preston:

Q. Is the inspection which you described to us the inspection that you made in accordance with your duties as a car inspector on the RF&P? A. Yes, sir.

Q. Is there any testing or inspection of the air-brake system at the time when the train arrives? A. Yes, sir.

Q. What is the nature of that test?

Mr. Savage: Just a moment. Does he know anything about that?

The Court: I didn't understand that he did any-
440 thing but inspect the journal by lifting the lid and observing whether the waste was in good condition and whether the brass was in good condition and whether there was adequate oil. If he had other duties, I think you had better find out about that, first.

By Mr. Preston:

Q. Was part of the inspection of incoming trains inspecting the brake riggings? A. Yes, sir.

Q. And the piston throw? A. Yes, sir.

Q. Will you describe a little in detail what that part of your inspection consists of?

Mr. Savage: Just a moment. Is that part of his job?

Mr. Preston: He testified that he said it was, that it was part of the inspection that he did.

Mr. Savage: He didn't so testify. He accepted your suggestion, but his original testimony did not say anything about brake rigging.

The Court: I would like to know what his duties were at that time.

By Mr. Preston:

Q. Mr. Parrish, were you supposed to inspect any part of the air-brake system in this inspection of the in-
441 coming Atlantic Coast Line trains. A. Yes, sir.
We have to look over the air-brakes as they come in there as much so as any other part of the car.

Q. What part of the air-brake system do you look at? A. We look at the piston travel. It is the piston that comes out and causes the brake-shoes to fit tight against the wheel.

Q. Do you look at any other part of the braking system? A. No, sir; that is about all we have to look at in incoming trains.

Q. If you find a piston that has not the proper amount of travel, does that have to go on your report? A. We have to adjust it. We adjust the brake riggings.

Q. Do the car inspectors adjust the brake riggings? A. Yes, sir.

The Court: If this is a convenient place, we will take a five-minute recess.

(A short recess.)

By Mr. Preston:

Q. Mr. Parrish, this is the same little sheet of paper I showed you before. What does that report indicate as to the condition of the brakes on freight cars of this incoming train? A. Well, that was one shop for air-brakes, inoperative. That was taken off of the train and put in the shop.

442 Q. Because the air brake— A. The air brake was inoperative.

Q. What does that report indicate as to the presence of hot-boxes, if any, on that incoming train?

The Court: You mean defective journals?

Mr. Preston: Defective journals; that is right.

A. According to this report, there were no defective journals in the train. It doesn't show any.

The Court: There was a car with defective brakes?

Mr. Preston: That is right.

The Court: Was that the number of any particular car?

Mr. Preston: No, sir. It has no significance whatsoever to us. There was a car in the train that had an air-brake inoperative when it arrived in Richmond.

The Court: What happened to it?

Mr. Preston: It was put in the shop.

By Mr. Preston:

Q. Doesn't the report indicate that, Mr. Parrish? A. Yes; put in the shops for repairs.

The Court: That was taken out?

The Witness: Yes, sir.

By Mr. Preston:

Q. Mr. Parrish, I show you another report, which is Defendant's Exhibit No. 5, and ask you if the inspec-
443 tion which this report indicates, if you took any part
in that inspection? A. Yes, sir; I was on the rear of the train, trying the air, making a brake test as it left Acca Yard.

Q. Will you tell us the difference between this test for air and the previous test for air which you described? A. Yes, sir.

Q. Will you go ahead and tell us, please? A. I didn't understand you.

Q. Will you go ahead and tell us the difference between this air test and the other one? A. In this air test the engine is coupled up with a train preparing to leave the yard. We go over these things, inspect the air brakes, see that they are all operative.

Q. How do you see that, Mr. Parrish—will you tell us what happens to the brakes during this inspection? A.

When the engineman pumps the train line up to a certain pressure, he applies the brakes and they all go on. If some of them don't go on, they are supposed to be inoperative.

Q. First, let's start out and take this step by step. You have the train made up in the yard? A. Yes, sir.

Q. Then the engine couples onto the train, as you say? A. Yes, sir.

444 Q. What does the engineer then do? A. What does the engineer do? He don't do anything until we give him a brake signal for him to apply his brakes. He gets a signal from the rear to apply his brakes.

Q. Does he apply the brakes on signal? A. Yes, sir.

Q. Are the brakes then checked? A. Yes, sir.

Q. Is each brake on the train checked as to whether or not it is properly on? A. Yes, sir.

Mr. Savage: Does he do all that?

Mr. Preston: Wait minute.

By Mr. Preston:

Q. On this particular train, how many men worked that train? A. That report shows three.

Q. Were you one of the three? A. That is what the report so shows me one of them. Yes, sir. Mr. Fryer on the head; Mr. Poton, the gang leader there, was in the center. M. T. Parrish was on the rear.

Q. That is you? A. Yes, sir.

Q. You were actually inspecting this train? A. The rear part of it.

445 Q. I believe you said, in the other inspection you inspected the west side of the train? A. Yes, sir.

Q. Is it a different system of inspecting an outgoing train, that you inspected the rear third of the train rather than one side of it?

Mr. Savage: Don't you think—

A. Ordinarily, when we are trying or testing the brakes on the train going out, all of us are on the side where the engineer is, where we can see signals from each other and the engineer can see signals from us.

Q. Can you tell from what side of the train—whether the brakes are on on both sides? A. Yes.

Q. How can you tell that? A. I can tell by the brake-shoes being tight against the wheel.

Q. Can you see under the train and see that? A. Yes, sir. You can see under the train. You can see the brake shoes under the train against the wheel.

Q. Then after it has been determined that all brakes are on, then what happens? A. We report the train to the engineer. He will release them.

446 Q. Then what happened? A. We go on and see that the brakes come off.

Q. Do you go over the entire train again? A. Yes, sir; that is what we usually do.

Q. Do you always do it?

Mr. Savage: I think we are going a little too far here. I will be glad to have you change places with him, but other than that, I think that you had better ask him what he does.

The Court: I sustain the objection.

Mr. Preston: I withdraw the question.

By Mr. Preston:

Q. On this Defendant's Exhibit No. 5, there is the notation, "4 pounds air leakage per minute"? A. Yes, sir.

Q. Can you tell me what that means? A. Well, that is what the engineer gave them, 4 pounds per minute leakage; after the brakes were applied, the air begins to leak off, and he claims they had 4 pounds per minute.

Mr. Savage: I move that part of his answer be stricken.

The Court: Yes. Read it all back. I don't think it is responsive, but I will make sure.

(The last portion of the record was read by the reporter.)

447 The Court I sustain the objection.

Do you think that needs any interpretation?

Mr. Preston: I do, if the Court please.

The Court: Very well. You may ask him what it means, as I think you did before, and try to make it responsive, Mr. Parrish.

The Witness: Well, it means four pounds leakage on his entire train per minute.

By Mr. Preston:

Q. Is that leakage out of the train line? A. Yes, sir.

Q. That is out of the entire brake system of the train? A. Four pounds a minute; yet, sir.

Q. Leakage? A. Yes, sir.

Q. That is a permissible leakage—is that a satisfactory test? A. Yes; that is about the ordinary leakage on a train of that length, 110 cars.

Q. Do you know what the maximum permissible leakage is, what is the most leakage you can have and still have a good train? A. Well, if he gets about 15 or 20 pounds there, they call it a bad train line and lots of times they make us go over the train and look for leaks.

448 Q. But this train had how many pounds per minute leakage? A. Four pounds leakage, and that indicates there was any leak in the train that you could hear.

Q. After this leakage determination is made, then is the train ready to go? A. Yes, sir; as soon as the train crew gets the bills and gets ready to pull out.

Q. Does that complete your inspection of the train? A. Yes, sir.

Q. Outgoing? A. Yes, sir.

Q. Is that done on all outgoing freight trains? A. Yes, sir.

Q. And this record is made up in the regular course of business? A. Yes, sir. We make a record of all trains.

Mr. Preston: I think that completes the direct examination.

Cross-Examination

By Mr. Savage:

Q. Mr. Parrish, you made two inspections; is that correct? A. Yes, sir.

449 Q. One immediately following the other? A. I didn't exactly catch you.

Q. One immediately following the other? A. What do you mean—the air-braking inspection, test? I think there are about two or three hours there between times when the train comes in Acca Yard and left there. I think there was about two hours or three hours. I don't remember exactly how much. The report shows it.

Q. You make one inspection of the journal box now; is that correct? A. Yes, sir. That is upon arrival.

Q. And, in addition to the journal boxes, you inspect what? A. Inspect the brake riggings, piston travel.

Q. Piston travel? A. Couplers.

Q. Couplers? A. Wheels; grab-irons. We inspect all of the parts of the car except on the top part, and they have a special man for the top.

Q. You inspect all safety appliances, except the running-boards, above, except the running-boards? A. Yes, sir.

Q. How many grab-irons do you have on these cars? A. All the way around the car?

450 Q. On your side. A. I don't remember how many there is.

Q. You don't know how many grab-irons there are on each car? A. No, sir; I don't remember.

Q. You are supposed to inspect them? A. If any of them are broken or any of them missing, we know it.

Q. You are supposed to inspect the hand-holes on the end of the cars, too, aren't you? A. Yes, sir.

Q. They are safety appliances, too, aren't they? A. Yes, sir.

Q. You are supposed to inspect the couplers, too, aren't you? A. Yes, sir.

Q. There are two of those on each car? A. Yes, sir.

Q. You are supposed to inspect the cut-lever on each car? A. Yes, sir.

Q. And there are two of those on each car? A. Yes, sir.

Q. And this is all at the time you make the inspection
of the journal boxes—that is all one inspection; is
451 that right? A. Yes, sir; it is all done on the same
inspection.

Q. And that is a separate inspection from the air inspection? A. Yes, sir.

Q. I believe you said you also inspected the piston travel, too; is that correct? A. Yes, sir. We watch the piston travel as we are inspecting the train on arrival.

Q. Yes. That is on the original inspection? A. Yes, sir.

Q. So that we might understand what piston travel is, as I understand it, on each car you have a piston which is something like a cylinder; is that right? A. Yes, sir.

Q. And in this cylinder is a plunger; is that correct? A. Yes, sir; that is right.

Q. And that plunger moves out of the piston; is that correct? A. Yes, sir.

Q. And on the end of that plunger is a rod which goes to your brake rigging; is that correct? A. All the U.A.B. brakes. The old-fashioned brakes have not got them.

Q. Has not got what? A. That little curled-up
452 end you spoke of.

Q. But, in any event, they all have a piston? A. Yes, sir.

Q. And the idea of that piston is that it comes out to cause the brake-shoes to apply against the wheels when the engineer makes a reduction of air; is that correct? A. Yes, sir.

Q. And there is a certain amount of piston travel that is permitted? A. Yes, sir.

Q. On each car? A. That is correct.

Q. And if you have too much piston travel, what happens? A. You have to take it up, adjust your brake rigging accordingly.

Q. I understand, but what is the mechanical effect of too much piston travel on the ability of the car to stop? A. Well, you don't have the proper pressure with the brake-shoes against the wheel if there is too much piston travel.

Q. And if your piston travel is too short, what happens? A. The same thing.

Q. What is the permissible piston travel? A. It is from five to eight inches, I think, for a perfect brake.

453 Q. From five to what? A. From five to nine for a perfect, brake if I am not mistaken.

Q. You are not quite sure of that? A. No; I don't guarantee it.

Q. And you are not quite sure about your permissible leakage to 15 pounds a minute on your air line, are you? A. Fifteen pounds a minute—four pounds. I didn't understand you, exactly. Fifteen pounds a minute.

Q. As I understood you to say, in answer to Mr. Preston's question, you said that there is a permissible leakage of 15 to 20 pounds per minute on train line pressure; is that correct? A. Per minute?

Q. Didn't you say that? A. On the entire train?

Q. Yes. A. I said, if the engineer reports 15 or 20 pounds leakage on his entire train, when we report the brakes to him, we have to go back over the train and look for leaks on account of there being too much leakage.

Q. I thought that was what you meant. What is the permissible leakage? That is the question Mr. Preston asked you. A. What do you mean—on each car?

454 Q. Permissible train line pressure leakage. A. Four pounds is a good train line, and eight pounds is a good train line.

Q. I didn't ask you that question. You are familiar with Westinghouse Air Brake regulations, aren't you? A. Well, I know a little something about it. I don't say I know all about air-brakes.

455 Q. I mean you know how much permissible leakage they permit on their equipment, don't you? A. On each car?

Q. Train line pressure? A. No, I don't know how much is on each car.

Q. I didn't ask you that. Don't you know they put out a manual and say that if you have more than a certain amount of train line leakage your brakes will not operate properly? Don't you know that? A. Yes, sir.

Q. What is that permissible train line leakage? A. I don't know exactly what it is.

Q. All right. You are not quite sure about the number of grab irons or hand holds that you have to inspect on each car? A. No, sir, I don't know if I remember I ever counted them.

Q. You also have to inspect the ladders, too? A. Lanterns?

Q. Ladders. A. Yes, sir, we inspect the ladders.

Q. Do you inspect the hand brake? A. Yes, sir, the bottom part of it and the man goes over the running board and he looks at the top of it.

Q. Does that take in the brake shelf? A. Yes, sir,
456 he looks at the brake shelf.

Q. You don't look at the top of the brake shelf? A. We look from the ground and if there is anything wrong with the bottom of it, we would find it but if there is something wrong on the top of it, we wouldnt see it.

Q. He doesn't inspect them at the same time you do, does he? A. No, sir.

Q. What do you look for on the hand brakes? A. Well, you look for your brake chain and your ratchet wheel.

Q. We can't hear you. A. We look for your brake chain and ratchet wheel.

Q. You don't look at the ratchet wheel, do you? A. No, the man on top does that.

Q. What do you look for? A. We look to see if the step is decayed or split—

Q. Wait a minute. Do you mean you do that? A. We do it from the ground as best we can and the top man does part of it, too.

Q. Who is charged with the duty of examining the brake itself, the ground man or the man on top? A. Why, I would say the man on top could see it better than the man on the ground.

457 Q. But you do part of it? A. We look at it, yes, sir.

Q. From the bottom? A. Yes, we look at it from the bottom.

Q. And, as I understand, this inspection is not made together by the man on the top and the man on the bottom, is it? A. No, sir.

Q. Do you examine the brake shoes? A. Brake shoes, yes, sir.

Q. Do you examine the length of the chain? A. Yes, sir.

Q. Do you test to see whether or not, when the brake is wound up, your shoes are against the wheels? A. The brakes are never wound up when we inspect them.

Q. All hand brakes are released— A. All hand brakes are released. The yard people, the brakemen are the ones who mind the hand brake. We don't have anything to do with that.

Q. You do inspect the hand brakes, don't you, to see if they operate properly? A. Yes, sir.

Q. To see if they operate efficiently? A. Yes, sir.

Q. You tell us how it is possible to make an inspection
of hand brakes when the brakes are not applied when
458 the man is not on top turning the wheel to apply the
shoes against the wheel? How can you tell whether
you have got an efficient brake?

Mr. Preston: If the Court please, I don't believe there is any testimony from Mr. Parrish that anybody winds the brake up in the course of the inspection that Mr. Parrish does.

The Court: What is the relevancy of the hand brake in this question? I want to give you a reasonable amount of latitude in your cross examination—

Mr. Savage: I will bring it out.

The Court: You say you will bring it in?
Mr. Savage: I will bring the relevancy in.
The Court: All right. Objection overruled.

By Mr. Savage:

Q. Tell us that, please. A. I didn't understand your question.
Mr. Savage: Will you read the question, Miss Rawls?

(Thereupon the last question was read by the reporter.)

The Witness: By the brake chain, if the brake chain is too long, you haven't got a sufficient brake. Sometimes the brake chain is too long and, in putting the hand brake on it will get hung up.

By Mr. Savage:

459 Q. But really the only way to test and see whether you have an efficient hand brake is for a man to be up on top and wind up the slack in your brake chain and used on the bottom so you can see if the shoes are up against the wheel, is that right? A. Yes, that is right.
Q. The same shoes used by the hand brake are also applied by the piston, is that right? A. Yes, sir.
Q. And, therefore, they are controlled by the train line? A. Yes, sir.
Q. And, therefore, they are the same brakes that are applied by hand? A. Yes, sir.
Q. Except when the train line is hooked up, the engineer controls the operation of those brakes, is that correct? A. Absolutely right.
459 Q. Yes. Now, getting back to the journal boxes, there are four on each car, aren't there? A. Yes—no, eight on each car.
Q. As far as your side is concerned, there are four on each side? A. Yes, sir.
460 Q. You had the west side? A. Yes, sir.

Q. So with a train of 110 cars, you had approximately 450 journal boxes to inspect, isn't that right? A. 440.

Q. 440, thank you. You are a better mathematician than I am; and you had the grab irons on each car, is that right? A. Yes, sir.

Q. You don't know how many of those you have on your side? A. I didn't understand that.

Q. I say you don't know how many grab irons you have on each side? A. No, sir, I don't remember that because I never counted them; a good many, quite a few.

Q. Half a dozen? A. More than that.

Q. Ten? A. We have the ladders and several on each side.

Q. Right. It would be about 13 on a side, wouldn't it? A. Maybe 12 or 13, 14, maybe 15. I don't know.

Q. A dozen or more, is that a fair statement? A. I will say approximately a dozen.

461 Q. Then you have got the bottom of the brake shelf to inspect, is that right? A. Yes, sir. You can see the bottom of the brake shelf.

Q. I understand. And you have got one of those on each car, is that right? A. Yes, sir.

Q. And your inspection of the journal box consists of looking at your waste to see if it has got oil in it? A. Well, that is one of the things we look for.

Q. If it doesn't have oil in it, what do you do? A. If there isn't sufficient oil in there, we have to put it in.

Q. Do you carry an oil can? A. Yes, sir.

Q. You had one with you on this trip? A. Yes, sir. We have oilers on the yard.

Q. Now, which is it? A. I say we have men with oil cans that go around behind the inspector. Q. You don't carry it yourself? A. No, sir, I don't carry them.

Q. What do you tell him that needs oil? A. Any that needs oil, the lid is left up.

Q. Except those without lids? A. Yes. Of course, those that have no lids—

462 Q. But you testified before some of them do not have lids. A. Those without lids, they are still open.

Q. And they leave the yard without lids? A. Yes, sir.

Q. And, of course, if sand or cinders were to get into a hot box without a lid, that would cause a hot box, wouldn't it? A. I have heard it would. I guess so.

Q. Mr. Parrish, you had how many years experience? A. Forty years and two months.

Q. And you know very well if sand or cinders get into a journal box because the lid is off, it will cause a hot box, don't you? A. I have known them to run two or three months with plenty of sand in them and they didn't get hot.

Q. You know of some that ran 45 minutes with sand in them—— A. I don't know of any.

Q. You know sand is an abrasive, don't you? A. I know sand is not supposed to be in them.

Q. And sand or cinders might get in if it doesn't have a top on it? A. Yes, sir.

Q. And yet many times they leave the yard without tops on them? A. Quite a few leave, I think. 463

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463 Q. How long did your inspection take, Mr. Parrish? A. It depends on the length of your train.

Q. No; I am talking about this particular inspection, the time you inspected the 440 journal boxes, the dozen or more grab irons or hand holds, the bottom of the brake shelf, the two couplers, and the piston travel on each car. How many pistons do you have on each car? A. You have one on each car.

Q. Let's see, that is 440, say another hundred and something is 540. Then you have got about a dozen hand holds. You have got about 6,000 things to inspect each time. That is about it, isn't it? Tell us how long your inspection took, how long this inspection took?

This is the report Mr. Preston showed you. Look at it and see the time you started it and the time you finished it.

You may help him, Mr. Preston.

Mr. Preston: May I see if he has the right one. Which inspection do you mean, Mr. Savage?

Mr. Savage: The one I have just enumerated. I tried to cover everything.

Mr. Preston: The incoming inspection.

The Witness: 9:25 to 10:20. That would be 45 minutes, wouldn't it? 464

Mr. Preston: I think you can agree that that is 55 minutes, Mr. Savage.

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467 By Mr. Savage:

Q. Mr. Parrish, how did you check piston travel? A. You check it by the length of it.

Q. How do you tell the length of it? A. You can look at it and tell whether it was too long or too short when you look at a thousand a day.

Q. You don't measure them? A. We don't measure them, no, sir.

Q. How far down is it? A. We can see it. The brakes are down when they come in on the train.

Q. Do you mean to say you can check piston travel if your engineer doesn't make a brake application? A. Yes, sir, we can tell the length of the piston travel.

Q. Without a brake application? A. Yes, sir.

Q. Not a very accurate test, is it? A. We don't measure them, Mr. Savage.

Q. No. A. We don't take a rule and measure every one.

Q. But I say you can't really make a very accurate test unless your engineer makes a brake application. 468 You can't make a very accurate test of your piston travel, can you? A. No, sir. We look at them when they come in, Mr. Savage, and the engineer cuts the engine off. The inspector goes along and they watch the piston travel as they go down the train.

Q. I know, but you understand what I mean? A. Yes.

Q. You can't make an accurate test of piston travel unless you have the engineer make a brake application, isn't that correct? A. That is the real proper way but they do that on the outgoing trains when they try the brake reading there.

Q. What was the train line pressure in the caboose the day you made this inspection? A. 70 pounds, I guess. We usually wait until they get 70 or 65, very nearly full pressure before we ever sign for the brakes. Then, if the engineer sees fit, he can wait until he gets full pressure before he applies his brakes. It is up to him.

Q. Is full pressure 70 pounds? A. 70 pounds, yes, sir.

Q. Don't you know, as a matter of fact, that the full pressure on the new Diesels is 80 pounds? A. I don't know. I don't know whether it is 80 with the new Diesels. 469 I don't know whether it is different from the other engines or not.

Q. You were never told that? A. No, sir.

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470 **Joseph D. Farley**, called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

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474 Mr. Savage: I withdraw my objection. I think he is qualified.

The Witness: Material inspector—

The Court: You need not go further into your biographical sketch. Counsel has conceded your qualifications.

By Mr. Preston:

Q. Mr. Farley, I would like you to assume the 475 following facts:

On December 12, 1949, a train of 69 cars of the Atlantic Coast Line came into Acca Yard in Richmond, and it arrived there at nine-twenty in the morning. Five minutes later, at 9:25, an inspection of this train was started by a group of three men; one at the east side of the train, one on the west side of the train, and one on top.

This inspection continued until it was completed at ten-twenty in the morning.

The men were railroad car inspectors, and they inspected, among other things, the journal boxes of the cars; lifted each journal box lid as they went down the line, the man on the east side and the man on the west side, looking inside to see if the brass bushing was in proper condition and in proper place, looking inside to see if there was sufficient lubrication for it in the box, looking inside to see if the waste or packing was in good condition and a good position, and generally inspecting the inside of the box for any effect, or anything that they could see by visual inspection.

The inspectors, themselves, did not do the oiling that was necessary, or replace the waste that was necessary. There was an oiler following along behind, for that purpose.

However, included in this inspection was also a requirement, or numerous requirements, for the inspection of
other items such as those required by the Safety
476 Appliance Act; the grab-irons, ladders, the brake
shells, the draw heads, the brake shoes, the piston
travel, the stirrups—

Mr. Savage: Cut-levers and grab-irons—

By Mr. Preston:

Q. Cut-levers and grab-irons. So that the items were also included in the inspection, and I say the inspection was completed 55 minutes later, on a 69-car train.

Can you form an opinion, from the facts I have given you, as to whether or not the journal boxes received an inspection that was in accordance with good operating practice of the railroads, as you know them to be?

Mr. Savage: If you will answer that, assuming, of course, that every other safety appliance received a proper and adequate inspection, I will have no objection to it.

Mr. Preston: I don't think Mr. Farley could say that.

The Court: I don't believe that Mr. Parrish included anything else in his inspection other than what has been enumerated. I don't recall anything.

Mr. Savage: He didn't. But the question is whether or not the journal boxes received an adequate inspection. We will have to assume that all the other appliances received an adequate inspection, too.

The Court: Those other items enumerated?

Mr. Savage: That is right.

477 The Court: You have no objection to that, have you?

Mr. Preston: No.

Mr. Savage: Then I have no objection to the question.

By Mr. Preston:

Q. Did you answer that you could form such an opinion, Mr. Farley? A. Yes, sir.

Q. Can you tell me what that opinion is? A. Well, I think he had spent adequate time on that one side of the train to thoroughly inspect all the parts and the journal boxes, having lifted all the lids. All he does is give a visual inspection of that in 55 minutes for 69 cars, is ample time on one side.

Q. On one side of the train for one man? A. On one side of the train for one man.

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481 Q. So if he inspected 69 cars in 55 minutes, he would have a little less than 48 seconds per car; is that right? A. That is about right; yes.

Q. Which would give them a little more than a second to inspect each item; is that right? A. Just about; yes.

Q. Which includes bracing the journal box lid, digging around in the packing, and doing all the things that are necessary to measure the piston travel and all that goes with it? A. He measures the piston travel by sight. If it has been 7 or 9 inches, he can see that. He doesn't put a rule up there. He has a visual inspection; and the journal box, he just raises the lid. It is just visual.

482 Q. He can't see that he had an efficient braking application unless he had a man to walk along with him and apply the hand-brakes while he was inspecting the shoes—that is the proper way to do it? A. Are you asking me about lubrication now, or all the other things?

Q. You qualified as an expert on these other things, too, I understood. You were in the shops of the C. & O.? A. Yes, sir.

Q. You are really a mechanical expert, in addition to a lubrication expert, too, aren't you? A. I wouldn't say "expert"; I have worked at it, too.

Q. I think you are qualified to answer the question, if you will, please.

Mr. Preston: Do you understand the question, Mr. Farley?

The Witness: You mean, using a hand-brake, tightening it up with the hand-brake?

Mr. Savage: He understands the questions, Mr. Preston.

By Mr. Savage:

Q. If you don't understand, I will be glad to repeat it again. A. Repeat it, please.

483 Q. The proper way of making an inspection of hand-brakes is for one inspector to go along over the tops of the cars, get on the brake shelf of each car, apply the hand-brake by the use of the wheel; and for the other inspector to be on the ground to make sure that the shoes are up against the wheel when the man on top applies the brake; is that correct? A. That is the proper way for the hand-brake application, yes, but not for the automatic brakes—

Q. I understand. And the hand-brakes, the same shoes are used on the hand-brakes which are also controlled by the piston travel; is that correct? A. That is correct.

Q. And the piston travel is controlled by the air line on each car; is that correct? A. That is correct.

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485 Q. That isn't quite responsive to my question. I say, if, in the course of an inspection, you find a lid missing from the top of the journal box, what is good railroading practice? A. To apply another one.

Q. Before the car goes out? A. That is right.

Q. To prevent what? A. Well, to prevent dirt entering the box.

Q. To prevent sand, cinders and ballast chips from entering the box; is that right? A. That is right.

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486 **Robert Eugene Brown**, called as a witness on behalf of the defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

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490 Q. Mr. Brown, had there been a lid missing from the journal box, would you have noted that on your repair card? A. No, sir.

Q. Why not?

Mr. Savage: I object to that.

The Court: Sustained.

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490 Q. Did you do any brake work, brake adjustment or brake repair work on this car? A. No, sir.

Q. Is there any notation on this card as to the requirements for brake work? A. No, sir.

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492 Q. And in this case, you found the babbitt melted? A. Yes, sir.

493 Q. What caused it to melt? A. It was destroyed. I can't tell. I don't know.

Q. I understand, but what caused the babbitt to melt directly? It was heat, wasn't it? A. Well, heat, yes.

Q. And you mean you don't know what caused the heat? A. No, sir.

Q. But you do know the babbitt was melted by high temperature? A. Yes, sir.

Q. Sand getting in a journal box would cause a babbitt to melt, won't it? A. Sand will cause it if it gets in there.

Q. And gravel chips, dirt, will act the same way, won't it? A. Yes, sir.

Q. And if a journal box has a lid missing, in order to prevent this stuff getting in there, you would replace the lid, wouldn't you, if you were inspecting the car? A. If I had it in the yard.

Q. If you had it? A. In the yard, I would replace it. If the car was in the yard, I would replace the lid, but on the road I have none with me, and I couldn't replace it.

Q. You say on the road that you have one—— A. On the road out on the road you have no lid with you. You can't replace it, I say. 494

Q. But in the yard you would? A. Yes, sir.

Q. So that if an inspection was made at the yard, and a lid was missing, it should have been replaced, shouldn't it? A. Yes, sir.

Q. I believe I have the same difficulty that Mr. Preston had in reading your handwriting—— A. It is mighty poor——

Q. Lots of us have difficulty reading our handwriting. A. It says "Car not equipped with spring packing retarder."

Q. Tell us what that is. A. That is A. A. R. rule packing. It works in your box, holds your packing down.

Q. To hold the packing down? A Yes, sir.

Q. And if it is missing, what happens. A. Well, lots of them, you know they just started with these. All cars don't have them.

Q. I understand; but if the spring packing retarder is not there, what happens? A. Don't anything.

Q. It holds the packing in place, doesn't it? A. It
495 holds the packing in place, like I say, but I said so
many of them don't have them.

Q. But if the spring packing retarder is not there, some of the packing may leak out? A. It holds the packing down so that there is no waste grab. That is what they are placed in there for.

Q. Waste what? A. They are put in there as a waste grab on the car.

The Court: Waste what?

The Witness: Waste—that is your packing in your journal underneath your——

The Court: Did you say grab?

The Witness: Yes.

By Mr. Savage:

Q. It is important for the journal to operate properly that you have spring packing retarder, isn't it? A. When they are equipped with it, yes, sir.

Q. But this car was not equipped with it? A. That is what it says, yes, sir.

Q. And that is the reason you made this notation on your inspection report? A. Yes, sir.

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497 **Welford Durett**, called as a witness by the defendant, being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

498 Q. Mr. Durett, will you give us your full name and address, please? A. Welford Durett, 1804 Duke.

Q. Alexandria? A. Alexandria, yes, sir.

Q. By whom are you employed, Mr. Durett? A. Potomac Yards.

Q. What work do you do for the Potomac Yards? A. I am working in the car shop now.

Q. What work were you doing for Potomac Yards in December of 1949? A. Car inspection.

Q. Were you one of a group that inspected Extra 1103 North on December 12, 1949? A. Yes, sir.

Q. I show you this page of a book, and ask you what this page is? A. Well, this is a checking of cars on here.

Q. What train does this page refer to? A. To 1103 RF and P.

Q. I ask that this page be marked for identification.

(Report of check of cars on Train 1103 RF and P was marked Defendant's Exhibit 12 for identification.)

Mr. Preston: Do you object?

499 Mr. Savage: I think I will have to, because I don't see what it has to do with our case.

The Court: Don't keep me in complete darkness.

Mr. Preston: I offer one page from this book on the inspector's report from Potomac Yards which indicates that the train which we are concerned with on a particular date was inspected by a group of three men, of which Mr. Durett was one.

Mr. Savage: Minus the car that was involved in the accident, and I object to it, because I don't think it is relevant.

The Court: What side did he inspect on?

The Witness: On the west side.

The Court: One of the claims, as I understand it, is that there was some defect in the braking system of the entire train; isn't that correct?

Mr. Savage: Not quite, sir. Inefficiency in the trainline system which includes every car in the train, because it is all part of the same system.

The Court: Well, then, wouldn't an inspection immediately after the abrupt stop be relevant to show whether or not there was anything found wrong?

Mr. Savage: This included all the cars, because each car has its own triple valve, its own piston, has its own hose, and it is all an integral part of the brake system, so
500 an inspection of part of it would not prove much.

The Court: Overruled.

By Mr. Preston:

Q. Mr. Durett, included in the inspection which is indicated by this page here, was there an inspection of the braking system of this train as it arrived in the Potomac Yard? A. All to be in good shape.

Q. Was there an inspection made? A. Yes, sir.

Q. What did that inspection consist of—what did you do? A. The air-brakes—

Q. Was the routine incoming inspection that you made? A. Yes, sir; the whole inspection of the whole train that came in.

Q. The whole train? A. Yes, sir.

Q. And you say inspected the biggest part of it? A. I inspected the west side of the train, the whole west side.

Q. Which part of the air-braking system did you inspect in this incoming inspection? A. I inspected the cylinders and all the brake riggings.

Q. Did you find anything wrong with this train?
501 A. No, sir.

Q. So far as the brakes were concerned? A. Yes, sir; that is right.

Q. Was it in satisfactory working order so far as your inspection was concerned? A. Yes, sir.

Q. Mr. Durett, just for our information, what do all these notations here mean? A. What—these? (indicating)

Q. Yes. A. Those are for large cars, No. 5's, for large cars; too large to go through terminals, and there is only one shop.

Q. Was there a car shopped, in this train? A. Yes, sir; a running board.

Q. You mean, for a running board missing? A. It didn't say. You see, this top man shipped it. We had to put it in the book.

Q. Were you the top man? A. No, sir.

Q. You were on the west side? A. Yes, sir; I was the west side man.

Q. Do you know what these other notations are on this page? A. No, sir. This is the boss, the foreman over at the shop.

502 Q. As far as the brakes are concerned, there is no indication of any bad brakes on this train? A. No, sir.

Mr. Preston: That completes the direct examination.

Cross Examination

By Mr. Savage:

Q. RF&P 1103 consists of just how many cars? A. I don't know exactly how many cars it had. I reckon, around a hundred.

Q. Wouldn't your inspection show how many cars it had? A. I don't think it did.

Q. Don't you know? A. No. I never have taken any interest in knowing that.

Q. Do you know whether it was a train of ten cars? A. No; it was around a hundred.

Q. You are not sure of the number? A. I am not sure of the number of the cars that come in.

Q. Your inspection report did not show what 1103 consisted of? A. No; I don't know how cars were brought up. It ought to be marked on the book there.

Q. Why isn't it? A. I say, it is, isn't it?

503 Q. I don't know. I am asking you. A. I think so—yes; 111.

Q. And your inspection was made where? A. On the west side.

Q. In Potomac Yards? A. Yes, sir.

Q. And Potomac Yards is where? A. Over in Alexandria, Virginia.

Q. And that is how far from Milford? A. Milford—I guess, 50, 60 miles.

Q. And your inspection was of the air-braking system? A. Yes, sir.

Q. And that inspection consisted of what? A. All the air-brakes and cylinders, everything on the cars.

Q. You inspected the west side, yourself? A. Yes, sir.

Q. And somebody else inspected the east side; is that right? A. Yes, sir.

Q. Of course, your inspection on the west side would not show whether the whole braking system was in good shape. It would just show whether the west side was in good shape; is that right? A. Yes, sir.

504 Q. Did your inspection include piston travel? A. Yes, sir.

Q. Tell us what it consisted of? A. Well, the air-brake is a cylinder, and when the engine comes in, it cuts loose from the train, and the cylinders come out, see, and we have to go along and cut all the air-hose and bleed the air from the cars and check them.

Q. You inspected each car separately? A. Yes, sir.

Q. 111 cars? A. Yes, sir.

Q. And what else did you inspect, besides the air-brakes? A. Wheels, couplers.

Q. Couplers? A. And grab-irons.

Q. Grab-irons? A. Yes, sir. Brake-wheels and siding on the cars, and all.

Q. All safety appliances? A. Yes, sir.

Q. Do you have any idea what time your inspection was made on December 12? A. No; I can't exactly say what time it was.

Q. Do you know how long your inspection took?
505 A. It took about two hours.

Q. And you had to inspect approximately 35 items on each car; is that right? A. Around that, I guess.

Q. In addition to bleeding each car? A. Yes, sir.

Q. How long does it take to bleed each car? A. I guess it would take around a minute, something like that; not quite.

Q. So if it took a minute to bleed each car, that would only leave you 60 minutes to do the rest of your job; isn't that right? A. It took a minute to bleed it, you say?

Q. You said it, didn't you? A. Yes; it takes around a minute, I reckon.

The Court: What does "bleeding" mean?

The Witness: To pull the air off the car.

The Court: Take a valve out?

The Witness: No; pull a rod. There is one on each side of the car.

The Court: Pull it out and put it aside?

The Witness: No; pull it out and hold it a few seconds, and the air comes on out.

The Court: And you put the rod back in?

The Witness; No; you turn it loose and it goes
506 back in place.

By Mr. Savage:

Q. The rod is used to bleed the cars—that is sort of a valve; is that right? A. Yes.

Q. And you pull the rod out, and it lets the air out of the braking system; is that right? A. Yes, sir.

Q. So you can check your piston travel; is that right? A. Yes.

Q. And that whole thing takes about a minute? A. It takes not quite a minute, I guess.

Q. All right; so what does it take—about three-quarters of a minute, something like that—do you know how long it does take? A. No. I never timed it to just how long it would take.

Q. You said before, it took about a minute; is that right? A. Yes; I guess, something like that.

Q. So you take away 111 minutes from your 2-hour inspection period and that would leave you the rest of the time to inspect your other 35 items on each car; isn't that right? A. Yes, sir; that is right.

Mr. Savage: That is all.

507 Re-direct Examination

By Mr. Preston:

Q. M. Durett, do you know how long it takes to bleed any one car?

Mr. Savage: Objected to.

A. It takes around a minute.

The Court: The objection is sustained.

Mr. Savage: I will withdraw it. He said it takes around a minute.

By Mr. Preston:

Q. Have you ever measured the time?

Mr. Savage: Objected to.

A. No, sir.

The Court: Overruled.

By Mr. Preston:

Q. Have you ever measured the time it takes to bleed a car? A. No, sir.

Q. When you said it took about a minute to bleed a car, that was just an approximation; is that right? A. Yes, sir.

Mr. Preston: That is all.

The Court: Stand down, you are excused.

(Witness excused.)

Mr. Preston: That completes the defendant's case.

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511 Mr. Mayfield: If Your Honor please, at this time the defendant, the R. F. & P. Railroad Company, does move for a directed verdict. As Your Honor knows, there is at least one cause of action here and perhaps two

although they are not so designated in the plaintiff's complaint.

There are several grounds set forth in the plaintiff's complaint for recovery and I believe they should be considered as separate causes of action since they are separate and distinct.

The Court: I agree with you on that. I think that, in effect, there are two causes or series or bases of action implicit in this complaint.

512 Mr. Mayfield: It is our belief that the first of these causes of action is a cause of action based upon two statutes, the Federal Safety Appliance Act and the Federal Employers Liability Act.

The Court: You say the first cause of action is based on the two statutes?

Mr. Mayfield: Yes, Your Honor, the two construed together so that I believe counsel for the plaintiff will agree with us in that regard.

The Federal Safety Appliances Act sets forth the duties which railroads must abide by and takes the place of negligence as set forth in the Federal Employers Liability Act. However, the Federal Safety Appliance Act itself does not apply for a right of action on the part of an employee of a railroad company. That right of action must be found at common law or in the Federal Employers Liability Act.

The Court: You mean the right to sue?

Mr. Mayfield: That is right and, of course, the plaintiff is relying on the Federal Employers Liability Act for his right to sue.

The Court: I would say the right to sue is common law and the particular liability was first set up by the Federal Employers Liability Act and second by the Safety Appliance Act but I guess it comes out the same.

513 Mr. Mayfield: Actually, it comes out the same with one exception, that the Federal Employers Liability Act includes a provision to the effect where a violation of the Safety Appliance Act is involved, contributory

negligence is not only a bar but also it is not to be considered in mitigation of damages.

Is that not correct?

Mr. Savage: With that we agree.

The Court: I should think so.

* * * * * * * * * *

Mr. Mayfield: It is our belief, Your Honor, that there is only one bit of evidence in this case from which it could possibly be inferred that there is a possible violation of the Safety Appliance Act and that is the testimony of a number of witnesses to the effect that this was a rough stop.

From that one fact several witnesses have inferred—

The Court: Haven't you forgotten the testimony of the conductor?

Mr. Mayfield: It may be that I had, Your Honor, but I don't know what you refer to.

The Court: He was asked had the brakes been operating properly would you have gotten a normal application and his answer, over objection, was yes. Do you remember that?

Mr. Mayfield: I didn't remember it, Your Honor, no.

The Court: The question was on page 222 and the answer is on page 223.

Mr. Mayfield: I think I had better look at that.

514 The Court: The objection was he was not qualified which I overruled.

Mr. Mayfield: Your Honor, I don't believe that he testified that he didn't get a normal application. He did testify that a rough stop ensued.

The Court: No. He was asked, "Had the brakes been operating properly, would you have gotten a normal application?" He answered, "Yes."

* * * * * * * * * *

521 The Court: Lets assume the premise that he opened it gradually for a minute and a half and then opened it wide.

Mr. Mayfield: If we assume that to be correct—and I believe I know what Your Honor is driving at—we then have a conflict of testimony between Mr. Brooks and
522 Mr. Carlson as to whether or not the brakes operated
in this instant the way they should have operated, whether they got the desired result.

The Court: The expected result.

Mr. Mayfield: The expected result.

The Court: Mr. Carlson said what you would expect under those circumstances would be a violent stop and Mr. Brooks said the contrary.

Mr. Mayfield: That is correct, sir.

The Court: That being so, isn't it a jury question to infer whether the brakes were in good order?

Mr. Mayfield: Your Honor, it seems to me—I have some trouble with it but the way I have viewed this testimony—it seems to me pretty much conjecture on the part of anyone who is not qualified as well as Mr. Carlson is.

The Court: I think that goes to the weight of it.

Mr. Mayfield: Perhaps I am wrong in that.

The Court: My standard is I must conclude that all reasonable men must reach the same conclusion, giving the plaintiff the benefit of every reasonable inference.

Mr. Mayfield: I have nothing further to say on the Safety Appliance part of it, Your Honor. That is the meat of our argument.

* * * * * * * * * *

523 Mr. Mayfield: All right, Your Honor.

As I see the other cause of action set forth by the plaintiff's complaint and also attempted to be proved by evidence which the plaintiff has introduced, is an action based on negligence outside of the Safety Appliance Act but based also on the Federal Employers Liability Act and there are several points to which the plaintiff has addressed himself in his evidence attempting to point out specific acts of negligence on the part of the defendant.

The first of these is the action of the engineer, 524 that is, the assistant road foreman of engines who was actually operating the Diesel front end of this train, Mr. Reid. I believe it is contended by the plaintiff that Mr. Reid's failure to stop the train immediately upon first viewing the smoke or his failure to look back a second time after his first application of the brakes to see whether the smoke was still flying and then immediately stop the train if he saw it was flying constituted negligence on the part of the defendant and that was at least a cause of the plaintiff's injuries.

If Your Honor please, I believe the testimony will indicate that there was no negligence on the part of Mr. Reid but I will pass over that point to one which I believe is easier of solution and that is the qutstion of causation. I will agree that if Mr. Reid had stopped the train there would have been no necessity for anyone else to stop the train but I will not agree that the roughness of the stop which actually occurred was due to Mr. Reid's failure to stop the train.

* * * * * * * * * *

525 The Court: Yes, the engineer said all the applications from the rear were emergency applications.

Mr. Mayfield: I am sorry, Your Honor, I thought you said all applications from the rear were negligent.

The Court: No, were emergency.

Mr. Mayfield: I believe the plaintiff himself testified that it was possible to get a smooth application from the rear and there was also testimony in the case, I believe on both sides—I may be wrong on the plaintiff's side—but I know it is correct, as far as Mr. Carlson is concerned, to the effect that an emergency application does not necessarily mean a rough application or a rough stop. The fact that the brakes are put into emergency and that you have emergency application of brakes does not necessarily mean that the stop is going to be rough.

* * * * * * * * * *

527 The Court: Do you think there is no proximate cause?

Mr. Mayfield: So far as Mr. Reid is concerned.

I have further argument on the question of the hot box.

The Court: In failing to stop when he saw smoke?

Mr. Mayfield: That is right, whether he was negligent or not. We do not believe he was but I believe the question can be more easily decided on proximate cause than on negligence.

* * * * * * * * * *

546 First, of all, the actions of the engineer on the train, Mr. Reid, and whether or not there is any evidence of negligence in the case so far as his actions were concerned.

* * * * * * * * * *

547 That is all the testimony I could find, Your Honor, on this point, and I do not believe there is anything in the testimony which would indicate that Mr. Reid's choice or his judgment in deciding this was probably a case of sticking brakes, and that he should exercise the skill which he knew might unstick the brakes, that of making a service application of the brakes, there is nothing to indicate his action in that regard was in any way negligent.

* * * * * * * * * *

548 In this case we have no testimony, as far as I could find, to show that what Mr. Reid did was not reasonable under the circumstances with what he knew, taking into consideration exactly what he knew, and his observation of what kind of smoke was emanating from that train comes into that, as does the fact that he was informed that smoke was emanating from both sides of the train.

That is my argument on Mr. Reid's action.

* * * * * * * * * *

552 The plaintiff further testified that if the brake valve was thrown wide open that an emergency application of the brakes would result.

553 Mr. Savage: I don't like to interrupt, but I think he said wide open all at once.

The Court: My notes say, to summarize, when he opened the valve wide open he came to an emergency stop. I don't remember.

Mr. Mayfield: I don't believe I do, either, Your Honor, but I will find that part of the testimony.

On page 40 of the testimony, Your Honor, the plaintiff testified, near the bottom of the page, in the event you opened the valve wide open you are bound to get an emergency application for the simple reason you are discharging all your air at one time.

Mr. Savage: That is the point I want to emphasize.

Mr. Mayfield: Whereas if you crack your valve you get a slow—and then there was an objection.

The Court: I think "at one time" gives a clue to what he meant, doesn't it?

Mr. Mayfield: Perhaps it does. I must admit I had overlooked that phrase.

The Court: I had, too.

* * * * * * * * * *

556 Mr. Savage: I think all of this is overlooking a little something. I was quite certain it was in the testimony, but recalling to the Court's attention will have a great deal of bearing upon the reasonableness of what Mr. Reid did.

Mr. Brooks testified at page 15:

"As the train approached Penola, Virginia, I was riding on the west side of the cupola and I observed
557 the train very closely as I had done on other curves prior to this one. I saw smoke and fire flying from approximately middleways of the train."

Seeing that fire came from a car on fire, whether it came from a journal box, whether it came from a sticking brake, regardless of what it came from, if the defendant's position is that Mr. Reid, seeing a car on fire should not have stopped, I can make no answer to that argument.

And, in addition to that, you admit, you admit that Mr. Brooks saw fire coming, because if you will read paragraph 7 of the complaint it says that the plaintiff observed smoke and fire, smoke and fire caused by said hot box, and immediately notified the conductor who was also in the caboose, and 7 of your answer says the defendant admit the allegations of paragraph 7 of the complaint.

I state that all through. As a matter of fact, you made an objection to the Court when I asked a hypothetical question about fire coming because Mr. Preston's impression and recollection was erroneous, and that objection was sustained. There might have been an entirely different line of testimony if somebody had said, "Here is a car on fire," as it admittedly was, because the waste had burned up, and had melted the babbitt.

* * * * * * * * * *

563 The Court: The motion for a directed verdict on each of the two causes of action is denied.

I am of the opinion that the proximate cause in question is one for the jury, that whether the engineer was negligent under the circumstances is one for the jury, that specific negligence having been established, having been
564 pleaded, and the evidence having been offered to support it, res ipsa loquitur is not applicable.

So far as the cause of action based on the alleged violation of the Safety Inspection Act is concerned, on a study early this morning of the cases I have come to the conclusion that the railroad was under the duty to provide an efficient braking system, and I have receded from the position I took yesterday in respect to a defective braking system. I think the coupling cases point that way. To be sure, there are no cases on air brakes that say just that, but the coupling cases say that, and I think the same analogy should be applied, and so far as the different four acts of negligence are concerned, I am of the view, and counsel may argue this point further if they desire, that the item of negligence identified as (a) should not be submitted to the jury, because I regard a hot box in somewhat the same category as I regard the blow out of a tire. It occurs perhaps seldom nowadays, but I don't think the fact it does occur shows negligence.

So far as (b) is concerned, I think that should be submitted to the jury. That relates to the negligent failure of the operator of the engine to bring the train to a stop.

So far as (c) is concerned, that should be submitted to the jury on the first cause of action, namely, the alleged violation of the Safety Appliance Act.

So far as (d) is concerned, that is the alternative
565 item, which I assume you don't press in view of the
allowance of (c).

Mr. Savage: We don't press it.

* * * * * * * * * *

568 Mr. Mayfield: May I ask you one question? Since Your Honor is going to instruct the jury on clause (b), failure of the operator of the said engine, said train to stop after he discovered the dangerous condition set forth in paragraph 6, in order just to save that point, will it be necessary that we submit for Your Honor's consideration an instruction which would cut this out?

The Court: No. You can object to the instruction on that point at the close of the case, or you can get it now. To be very safe, you better object, and so no question will be raised, so far as I am concerned it is done right now.

The Court: * * * Mr. Savage's number 1, you object to it, of course, don't you?

Mr. Preston: Yes, if the Court please.

* * * * * * * * * *

570 Mr. Preston: Again on that prayer, and with all respect to Your Honor's earlier ruling, we object to the prayer on the ground of the use of the word "efficiently" in there.

* * * * * * * * * *

595 The Court: Such negligence proximately **caused,** in whole or in part, the conductor to—I don't think this has anything to do with whether it was normal or not. The negligence of the engineman, as I see it, proximately caused the conductor to bring it to a stop which was of a violent and——

Mr. Preston: Let us cover it this way.

Caused the conductor to apply the air from the rear of the car which resulted in—in other words, we don't want to draw the inference.

The Court: Apply the brakes, how is that?

Mr. Preston: That is all right.

The Court: Apply the brakes from the rear of the car.

Mr. Savage: And that said application resulted—

596 The Court: You have got to have "cause," "caused an unusually rough stop." That is the point.

Mr. Savage: That is right.

The Court: That such negligence proximately caused, in whole or in part, the conductor to apply the brakes from the rear of the train which resulted in bringing the train to a stop of an unusually rough and violent character.

Mr. Savage: That covers it.

Mr. Mayfield: If Your Honor please, of course we want to leave our objection in on the proximate cause.

The Court: Oh, sure. Let me write that down.

* * * * * * * * * *

615 **[Excerpts from Charge to the Jury.]**

* * * * * * * * * *

623 The first-mentioned claim is based upon an Act of Congress commonly referred to as the Safety Appliance Act, which provides that it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic, not equipped with a power driving wheel brake and appliances for operating the train brake system or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing the train can

control its speed without requiring brakemen to use the common hand brake for that purpose. There is no dispute that the defendant is such a common carrier and there is no dispute that the locomotive in this case was so equipped and that a sufficient number of cars were equipped, as required, but the law, as construed, requires in addition to being so equipped the train brakes must operate efficiently, that is, must function properly and the defendant is liable under this Act for injuries proximately caused, in whole or in part, by the operation of the train with a braking system which did not operate efficiently and the duty of the railroad is absolute and continuing in this regard, irrespective of any negligence on its part.

That is the first cause of action, and, in that connec-
624 tion, there is testimony that the conductor at the rear
of the caboose opened the air valve gradually for approximately a minute and a half and then opened it all the way and that this was the usual and customary way to get a normal application or a service stop, as it is called, or a smooth stop. Of course, a smooth stop is a relative term. All stops on railroads usually involve some jerking and jolting and there is testimony that this was the usual and customary way to get the usual service stop on application of the brakes but, instead, the testimony shows the train came to a rough and violent and unexpected stop and from this the plaintiff argues that the brakes did not operate efficiently.

The defendant, on the contrary, has offered evidence of inspections of the brakes before and after the stop, and the use of the brakes before and after the stop, tending to show that the brakes were operating efficiently. It has also offered, by the testimony of the witness Carlson, that under the circumstances of this case there was no mal-functioning of the brakes and the stop that was caused by the conductor was the normal or expected stop which he says, in this case, was a violent stop upon the application of the brakes. As I recall it, I think he said because the air had been reduced by the application of the brakes by the engineman, there was less air at the rear of the train than at

the front of the train and the stop which was caused
625 by Mr. Cunningham, the conductor, was necessarily
a violent stop and that was the normal stop and that
there was no inefficiency in the braking system.

Those are the two claims.

Therefore, the essential elements of the first cause of action relied upon by the plaintiff are as follows:

First, that the plaintiff was an employee of the defendant and engaged in his duties on the freight train at the time in question, as to which there is no dispute.

Second, that the defendant at that time violated the Safety Appliance Act in that it operated a train with a brake system which did not operate efficiently.

Third, that such violation proximately caused, in whole or in part, the train to come to a rough and violent stop of a type not normally expected if the brakes were operating efficiently, resulting in the plaintiff being thrown to the floor and injured.

If you find that the plaintiff has established each and all of those three essential elements by a preponderance of the evidence, your verdict will be for the plaintiff. If you find that the plaintiff has not established each and all of those three essential elements by a preponderance of the evidence, your verdict will be for the defendant on that cause of action.

If the jury finds from the evidence that the accident was
proximately caused, in whole or in part, by the fail-
626 ure of the air brakes to function efficiently at the
time of the accident, although applied in a normal,
usual and customary manner by the conductor from the caboose by the control of the conductor's valve, then said failure fastens liability on the defendant, irrespective of whether the defendant was negligent or not.

Now, I shall come to the second cause of action or claim. This is based on the theory of negligence of the defendant which is a necessary ingredient in this cause of action and the essential elements of this cause of action are the following:

First, that the plaintiff was an employee of defendant and was engaged in the performance of his duties on the occasion in question as to which, as I have said, there is no dispute.

Second, that defendant's employee, the assistant road foreman of engines controlling the engine, was negligent in failing to bring the train to a stop by the engine valve when he saw or in the exercise of reasonable care should have seen, smoke or fire or both emanating from the car about midway of the train.

Third, that such negligence proximately caused, in whole or in part, the conductor to apply the brakes from the rear in the usual and customary manner which, under the circumstances of this case, brought the train to an unusually rough and violent stop thereby throwing the
627 plaintiff to the floor and injuring him.

If you find that the plaintiff has established each and all of those three essential elements by a preponderance of the evidence, your verdict will be for the plaintiff. If you find the plaintiff has not established each and all of those three essential elements by a preponderance of the evidence, your verdict will be for the defendant on the second claim for cause of action.

Whether or not there was any negligent failure of the defendant to maintain the car in such a manner as to prevent a hot box and whether the conductor was negligent in applying the brakes from the rear are not before you as claims of negligence, the claim of negligence for your consideration being the one I just mentioned.

If you find that the acting foreman of engines, who was operating the engine on the day of the accident, was negligent in failing to stop after discovery of smoke coming from the middle of the train caused by a hot box or sticking brakes and if you further find that such negligence, in whole or in part, proximately caused the happening of the accident, then the said verdict must be for the plaintiff.

* * * * * * * * * *

634 Mr. Preston: Provided that our motion for a directed verdict on the negligence count includes the question of proximate cause and our permanent objection to it. In other words, we want to preserve our full rights under the motion for a directed verdict and do not want to waive any objection we may have to your mentioning causation in this charge, if that is understood for the record. We have no objection to the charge as given.

Mr. Savage: We understand you are making a motion——

The Court: You wish to renew the objections you have previously made, is that it?

Mr. Preston: Yes, let's put it that way.

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11211

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a corporation, *Appellant*,

v.

THOMAS M. BROOKS, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

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For the
District of Columbia Circuit
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QUESTIONS PRESENTED.

Plaintiff, a flagman, employed by defendant Railroad Company, while riding in the caboose of a freight train, which was equipped with a power brake system which gave the *engineer* the control of the train required by the Safety Appliance Act, was injured by the sudden stopping of the train when the *conductor* applied the emergency air brake from the caboose when he observed smoke from a "hot box" on one of the cars.

The questions are whether the District Court erred in overruling defendant's motion for a directed verdict, and

(1) In leaving to the jury any issue predicated on a violation of the *Safety Appliance Act;*

(2) In instructing the jury, under above circumstances, that if they found that the brakes failed to function "efficiently" when applied by the conductor from the rear of the train, such failure constituted a violation of the Safety Appliance Act and thereby fastened absolute liability on the defendant Railroad Company;

(3) In submitting to the jury the question whether the failure of the engineer to stop the train immediately when he observed smoke from one of the cars proximately caused, in whole or in part, the sudden stop which resulted in plaintiff's injury when the conductor applied the air brake from the rear of the train after the conductor observed the smoke.

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IN THE

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RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a corporation, *Appellant*,

v.

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Appeal from the United States District Court for the District of Columbia.

BRIEF FOR APPELLANT

I.

JURISDICTIONAL STATEMENT

The appellant, Richmond, Fredericksburg and Potomac Railroad Company, appeals from a final judgment of the United States District Court for the District of Columbia upon a verdict of a jury in favor of the appellee, Thomas M. Brooks, a flagman employed by defendant, for personal injuries sustained by him as the result of the sudden stopping of a freight train on which he was riding in the course of his employment in interstate commerce.

The District Court had jurisdiction of the action which was predicated upon the provisions of an Act of Congress of April 22, 1908, ch. 149, 35 Stat. 65, with amendments thereto, commonly known as the Federal Employers' Liability Act (45 U. S. C. Secs. 51-60), and the Act of Congress of March 2, 1893, ch. 196, 27 Stat. 531, with amendments thereto, commonly known as the Safety Appliance Act (45 U. S. C. Secs. 1-16).

Appeal to this court from the judgment of the District Court is authorized by Section 17-101, District of Columbia Code (1940).

II.

STATEMENT OF THE CASE

A. Proceedings Below

This action was instituted on November 7, 1950, in the United States District Court for the District of Columbia by Thomas M. Brooks, appellant, hereinafter called "plaintiff," against the Richmond, Fredericksburg and Potomac Railroad Company, appellee, hereinafter called "defendant" and sometimes referred to as "RF&P," to recover damages on account of personal injuries sustained by the plaintiff, a flagman, who was riding in the caboose of a long freight train, consisting of 112 cars, en route from Richmond to Potomac Yard, near Alexandria, Virginia.

In his complaint, plaintiff alleged that he was injured by being thrown against the floor and wall of the caboose, in which he was riding, as a result of the sudden stopping of the train when the conductor applied the air brakes by using a valve provided for that purpose on the rear platform of the caboose, when plaintiff called the conductor's attention to smoke emanating from under one of the cars in the middle of the train, which plaintiff and the conductor attributed to a "hot box."

Briefly, plaintiff alleged that (a) the defendant was negligent in allowing a hot box to develop; (b) the engineer was negligent in failing to stop the train immediately when he discovered the smoke; (c) that the air brakes were inefficient and thereby did not meet the requirements of the Safety Appliance Act; and (d) in the alternative, that the conductor applied the brakes from the rear of the train in a negligent manner.

At the close of all the evidence, the defendant moved the Court to direct a verdict in favor of the defendant.

The Court ruled in favor of the defendant as to items (a) and (d), namely, that the plaintiff failed to prove that the defendant was negligent in allowing a hot box to develop and failed to prove that the *conductor* was negligent.

The Court, however, overruled defendant's motion for a directed verdict and left item (b) to the jury to determine whether the engineer was negligent, and, if so, whether his negligence, in whole or in part, proximately caused the accident. With respect to item (c), the Court instructed the jury that if they found that the air brakes failed to function "efficiently," then such failure "fastens liability on the defendant, irrespective of whether the defendant was negligent or not."

The jury returned a verdict in favor of the plaintiff for $75,000, and judgment was entered thereon.

Defendant filed a motion under Rule 50, F. R. C. P., for judgment for the defendant notwithstanding the verdict or for a new trial.

The Court denied the motion for judgment notwithstanding the verdict and entered an order July 27, 1951, denying the motion for a new trial if the plaintiff filed, within ten days, a remittitur of that part of the verdict and judgment in excess of $50,000. The remittitur was filed by the plaintiff, on August 6, 1951, and final judgment was entered in due course. From that judgment, this appeal was noted on August 24, 1951, and perfected in due course.

B. Statement of the Facts

On December 12, 1949, the RF&P freight train involved in this case pulled out of Acca Yard, the RF&P freight yard in Richmond, and proceeded north toward Washington. The long train, consisting of 112 cars, was pulled by one of the then relatively new RF&P Diesel locomotives (App. 19, 105). This particular Diesel locomotive was made up of four units coupled together, two "A" units and two "B" units. The "A" units are the pointed-end units which the layman conceives of as the front of a train. The "B" units are the flat-end units. The four units of the engine in question were arranged in the following order from the front to the rear: A, B, B, A (App. 72, 83-85). C. I. Reid, Assistant Road Foreman of Engines, a veteran engineer of 28 years' experience on the Richmond to Washington run, was at the throttle on the right hand side of the front unit of the Diesel locomotive. He was one of the men selected by the railroad to handle the Diesels and instruct other engineers in their operation. The run in question was in a sense an instruction run, and the regularly assigned engineer was riding in the cab observing Reid. However, it is not disputed that Reid was the engineer in control of the locomotive at all times material in the instant case. R. L. Watson, the fireman, was on the left hand side in the cab of the locomotive (App. 98-99).

S. D. Cunningham, the conductor, who was in command of the train movement, was riding in his customary position in the cupola or tower of the caboose at the rear of the train.

Thomas M. Brooks, plaintiff, 30 years of age, who had been with the RF&P a little over 9 years, was in the cupola of the caboose with the conductor (App. 118, 17). On the day in question, the plaintiff was employed by the RF&P as a flagman, and he described his duties as consisting primarily of protecting the rear of the train. When the train was under way, it was also one of the general duties of the flagman to observe the general condition of the train while he was in the cupola (App. 18).

The other member of the crew on the day in question was John W. Florence, who was employed as front brakeman. He testified that he was riding on the rear A unit of the locomotive (App. 71, 72). As shown above, this unit was identical to the front unit of the locomotive, except that the unit on the rear was running backwards, hooked into the other three units, thus comprising a four-unit locomotive.

Most of the 112 cars making up this RF&P freight train were cars that had comprised an Atlantic Coast Line freight train which had come into Acca Yard, in Richmond, where they had been inspected twice in the usual manner by the RF&P before being hauled to Washington as an RF&P freight train. The car which later developed the "hot box" had been in the ACL train (App. 181, 200, 202; Deft's Ex. 2 and 8, not printed). In the course of the first inspection, one car on the incoming train was taken out of the train and put in the shop because its brakes were found to be inoperative (App. 201, 202). The inspection immediately before departure from Richmond disclosed that there was an air leakage in the overall air brake system of four pounds per minute, but the evidence is clear that anything up to seven pounds per minute of leakage in the air brake system is normal and permissible under the rules of the Association of American Railroads (App. 204, 205, 145; Deft's Ex. 4, not printed).

After the inspections, this freight train left the Richmond terminal and proceeded north toward Washington in an uneventful manner until the occurrence hereinafter mentioned. Reid testified that as the train proceeded north he made three or four brake applications on the train by way of instruction and demonstration and that in each instance the brakes functioned properly (App. 99).

Approximately one hour out of Richmond, near Milford, Virginia, the fireman on the left side of the locomotive glanced back down the long line of cars and saw smoke coming from under the left hand side of one of the cars in the train, about 40 or 50 cars to the rear of the engine, and called Reid's attention to this fact (App. 115). Reid then looked back down his side of the train and also saw smoke coming from under his side (App. 99, 100). Reid testified that the general color of the smoke which he observed was "light gray, whitish" (App. 108). At about the same time, Florence, who, it will be recalled, was the front brakeman riding in the rear A unit, testified that he also saw smoke about halfway down the train. He immediately stuck his head out of the window on the engineer's side of the train, saw Reid up ahead looking back towards the train and gave Reid the hand signal meaning "hot box." By the term "hot box" is meant the condition which exists in the journal box, in which one end of a car axle rests, when the axle end becomes overheated. However, Reid acknowledged his hand signal and returned a hand signal for a "sticking brake" (App. 73). Reid explained at the trial his reasons for suspecting a sticking brake, on the basis that normally a sticking brake causes smoke to be emitted from both sides of a train because the brake sticks on both sides, while smoke caused by a "hot box" is normally observed on only one side of the train (App. 100). Reid also relied on the color of the smoke which he observed as gray or white, as distinguished from "dark smoke, and fire in it" (App. 108). Accordingly, Reid, relying on his long experience as an engineer, proceeded with the normal and customary method for releasing a sticking brake, by making a service application of the brakes, followed by a releasing of the brakes. The obvious purpose of such a procedure is simply to dislodge the sticking brake (App. 99, 100, 196, 197).

According to the plaintiff's estimate, the train was going about 50 or 55 miles per hour when the smoke was observed and the service application reduced the speed to between 20 and 25 miles per hour (App. 21). Shortly after releasing the brakes, the necessity for sounding the whistle at a crossing occupied Reid's attention (App. 100, 101), and shortly after passing the crossing, the brakes went into emergency. The train came to a very rough stop, characterized by the several witnesses in varying language (App. 22, 31, 73, 74, 101).

Meanwhile, both the conductor and the plaintiff flagman in the caboose had also observed the smoke being emitted from approximately the middle of the train. The plaintiff first saw what he testified to be "smoke and fire flying from approximately middleways of the train." He immediately notified the conductor who was up in the cupola with him, and they suspected that it might be a "hot box." Accordingly, they both got down from the cupola for the purpose of making an emergency application of the brakes from the rear of the train. However, as they both climbed down from the cupola, they noticed that the train was being slowed down, and they assumed that the engineer was proceeding to stop the train. As mentioned above, the brakes were then released by the engineer, pursuant to his plan of testing the cause of the smoke, and the speed of the train gradually began to increase. The plaintiff and the conductor then decided that probably the engineer had not seen the smoke, and, therefore, Cunningham again proceeded immediately to stop the train from the rear (App. 21, 22, 118-120).

The conductor took his position on the rear platform of the caboose and began to "crack" the conductor's valve (App. 120, 121). The plaintiff testified that he expected "some roughness" from the stop and that he took hold of a grab iron with each hand and was standing in a position facing the rear of the caboose (App. 44, 45). He and the conductor testified that the valve was opened in a normal manner, by gradually cracking the valve over a short interval of time, and then by opening the valve all of the way. The entire process took between a minute and a half and two minutes (App. 44, 45, 121). The conductor's manipulation of the emergency valve resulted in what is known as an emergency stop (App. 38, 73, 101).

As a result of the stop, the plaintiff was thrown to the floor and against a wall of the caboose. The plaintiff testified that he experienced considerable pain at the time, but, after the train stopped, he proceeded out of the caboose and down the track to protect the rear of the train (App. 22). An inspection was then made of the car and a "hot box" was discovered on one of the wheels. The car in question was promptly removed from the train, and the train proceeded on its run to Washington (App. 77, 104), but no repair work was necessary on the brakes on the car that had the "hot box" (App. 219; Deft's Ex. 11, not printed).

The remainder of the trip to Washington was entirely uneventful. The engineer made various applications of the brakes, and at all times the brakes operated in the normal manner when controlled by the engineer (App. 104). On the arrival of the train at its northern terminus, Potomac Yard, the general freight yard of the RF&P, the entire train was again inspected in the normal and customary manner, and no defects were discovered in any of the braking equipment of the train (App. 222, 223; Deft's Ex. 12, not printed).

With regard to certain other miscellaneous facts connected with the case, there was some conflict between the testimony of Reid, the engineer, and Florence, front brakeman and witness for the plaintiff, as to the air pressure on the air brake line at the time the train left Richmond and also immediately before the stop in question (App. 74, 90, 100, 109).

There was, however, no controversy as to the fact that the brakes when operated by the *engineer* on the locomotive operated in the normal and customary manner at all times during the course of the trip from Richmond to Washington, and no rough stops other than the one in question occurred.

From the testimony of Florence and Reid, it appears that they observed different colors of the smoke being emitted from under the train, and certain conflict existed between the witnesses as to what conditions properly indicated a "hot box" and a sticking brake, and what precautionary measures should properly be taken when such conditions are observed (App. 86, 108). However, both the plaintiff and Florence, the plaintiff's own witness, agreed that the only purpose for stopping the train in case of a "hot box" is to prevent a possible derailment caused by an axle wringing off. In answer to the question by plaintiff's attorney, "What is unsafe about a hot box," Florence answered as follows:

> "Well, if it is continued to run in an unsafe condition when it is extremely hot, the end of the journal will break off and wreck your train" (App. 76).

In answer to a question as to the reason for any alleged rule requiring engineers or trainmen to bring a train to a stop when they suspect a "hot box," the plaintiff testified as follows:

> "A. In the event of a hot box, a journal can wring off and turn the train over (App. 40).
>
> * * * * * * * * *
>
> "Q. In other words, to reduce it to language we all understand, it is liable to break an axle, wring an axle off? A. Wring an axle off.
>
> "Q. Which would mean the axle would drop down, and might cause what? A. An accident, a derailment" (App. 41).

Immediately upon the arrival of the train at Potomac Yard, the plaintiff was taken to the Alexandria Hospital, attended by a doctor, and sent home to Richmond (App. 23). There he submitted to medical and surgical treatment over a course of several months, in an effort to alleviate the condition in his back alleged to have been caused by the rough stop; but among the attending and examining physicians, there is strong conflict as to what part of his present difficulty is attributable to the fall in the caboose, as to the success of the surgery that was done, as to the extent of his disability, and as to how much, if any, permanent residual disability is to be expected. The plaintiff has made no claim to total disability, but testified that he was unable to perform the physical labor required of a brakeman or any but the lightest tasks (App. 27). The various doctors recommended light work only (App. 56-68, 132, 150-174).

C. Theories on Which District Court Submitted the Case to the Jury

Plaintiff's complaint alleged four separate causes of the injury: (a) negligence of the Railroad in allowing a hot box to develop; (b) negligence of the engineer when he discovered the smoke; (c) a violation of the Safety Appliance Act due to alleged inefficiency of the air brakes; and (d) negligence of the conductor in his operation of the valve in the rear of the train which applied the emergency brakes.

The Court refused to submit items (a) and (d) to the jury, instructing the jury with respect thereto:

> "Whether or not there was any negligent failure of the defendant to maintain the car in such a manner as to prevent a hot box and whether the conductor was negligent in applying the brakes from the rear are not before you as claims of negligence * * *" (App 239).

In fact, plaintiff's attorney stated, during argument after the evidence was closed, that he would not press item (d); that is, he withdrew his claim that the conductor was negligent (App. 235).

The Court, however, over defendant's objection, granted plaintiff's prayers Nos. 1 and 4, reading as follows:

Plaintiff's Prayer No. 1:

> "The Court instructs the Jury that if they find from the evidence that the accident was proximately caused, in whole or in part, by the failure of the air brakes to function efficiently at the time of the accident, although applied in a normal, usual and customary manner by the conductor from the caboose, by use of the conductor's valve, that if they so find, then said failure fas-

> tens liability on the Defendant, irrespective of whether the Defendant was negligent or not'' (App. 7).

Plaintiff's Prayer No. 4:

> ''The Court instructs the Jury that if they find the Acting Road Foreman of Engines who was operating the engine on the day of the accident was negligent in failing to stop after discovery of smoke coming from the middle of the train caused by a hot box or sticking brakes and if they further find that said negligence, in whole or in part, proximately caused the happening of the accident, then said verdict must be for the Plaintiff'' (App. 8).

The Court repeated the above prayers almost *verbatim* and amplified them in his oral charge to the jury (App. 238-239), and therefore submitted the case to the jury on two theories, which may be summarized as follows:

Safety appliance act. With respect to item (c), the Court summarized the provisions of Section 1 of the Safety Appliance Act, hereinafter quoted, and then instructed the jury that *there was no dispute that the locomotive in this case was equipped with the brake system required by the Act and that a sufficient number of cars were equipped as required thereby* (App. 237), but added:

> ''* * * but the law, as construed, requires in addition to being so equipped the train brakes must operate efficiently, that is, must function properly and the defendant is liable under this Act for injuries caused, in whole or in part, by the operation of the train with a braking system which did not operate efficiently and the duty of the railroad is absolute and continuing in this regard, irrespective of any negligence on its part'' (App. 237).

Negligence of the engineer and proximate cause. The theory on which the District Court left this issue with the jury was on the issue of whether the engineer, confronted with the physical conditions which he saw or should have known existed, should have brought the train to an immediate stop, instead of making a service application of the brakes, followed by a release of the brakes, and whether such negligence, if any, was the proximate cause of the injury to the plaintiff (App. 239).

It is the most earnest contention of the defendant that neither of these questions should have been left to the jury. It is, of course, perfectly obvious from countless decisions, but should nevertheless be emphasized at this point, that, since the District Court submitted the case to the jury on two theories, if the District Court erred in submitting either of these questions, this Court cannot presume that the jury arrived at their verdict on the basis of a correct theory, and, accordingly, the case must be reversed and a new trial granted. See *e.g., Tiller* v. *Atlantic Coast Line R. Co.,* 323 U. S. 574 (1945); *Christian* v. *Boston & M. R. R.,* 109 F. 2d 103 (C. C .A. 2, 1940); *Baltimore & O. R. Co.* v. *Reeves,* 10 F. 2d 329 (C. C. A. 6, 1926).

The argument of the defendant will consider both questions in the above order.

III.

STATUTES INVOLVED

Safety Appliance Act

§1. **Driving-wheel brakes and appliances for operating train-brake system.** It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose (Act of March 2, 1893, ch. 196, § 1, 27 Stat. 531; 45 U. S. C. § 1).

(Section 9 of the Safety Appliance Act and Regulations of the Interstate Commerce Commission define what constitutes a "sufficient number of cars" under above Section 1, about which no question has been raised in this case; and other Sections of the Safety Appliance Act refer to automatic couplers, grab irons, hand brakes and other appliances not involved in this appeal.)

Federal Employers' Liability Act

§ 51. **Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.** Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

* * * * * *

(Act of April 22, 1908, ch. 149, § 1, 35 Stat. 65; amended August 11, 1939, ch. 685, § 1, 53 Stat. 1404; 45 U. S. C. § 51).

IV.

STATEMENT OF POINTS

The District Court erred in overruling defendant's motion for a direct verdict (App. 234), and

1. In submitting to the jury any issue predicated on a violation of the Safety Appliance Act (App. 238);

2. In granting plaintiff's prayer No. 1 (App. 7), hereinbefore quoted, and in instructing the jury that, even though the train was equipped with air brakes which gave the *engineer* the control of the train required by the safety Appliance Act and even though the conductor was not negligent, if the jury found that the brakes failed to function "efficiently" when applied by the *conductor* from the rear of the train, such failure constituted a violation of the Safety Appliance Act, thereby fastening liability on the Railroad Company, irrespective of whether the Company was negligent (App. 238);

3. In granting plaintiff's prayer No. 4 (App. 8), hereinbefore quoted, and in submitting to the jury the question whether the failure of the *engineer* to stop the train immediately when he observed smoke from one of the cars proximately caused, in whole or in part, the sudden stop which resulted in plaintiff's injury when the *conductor* applied the air brake from the rear of the train after the conductor observed the smoke (App. 239).

V.

SUMMARY OF ARGUMENT

A. Safety Appliance Act

1. No evidence of noncompliance with safety appliance act.

The Safety Appliance Act contains no requirement, explicit or implicit, as to the functioning of air brakes, other than such as is contained in Section 1 of the Safety Appliance Act, which requires only, in short, that the train be so equipped as to enable the *engineer on the locomotive* to control the train. There was absolutely no evidence in the case at bar that the *engineer on the locomotive* could not or did not so control the train at all times material to this case, and, accordingly, it was error to submit to the jury any issue predicated on a violation of the Safety Appliance Act.

2. Errors in instruction on scope and applicability of safety appliance Act

Even if it be admitted, for the sake of the argument, that there was in the case at bar proof of any defects which might be evidence of the lack of control by the *engineer on the locomotive,* the District Court erred in not confining the instructions to that issue. There is clearly no basis in the Safety Appliance Act for the issue which the District Court submitted to the jury of the "efficiency" of any mechanism for braking the train *from the rear.*

B. Alleged Negligence of the Engineer and Proximate Cause

If there was no violation of the Safety Appliance Act, then under the Federal Employers Liability Act it was incumbent upon the plaintiff to prove that the defendant was negligent.

Even assuming negligence on behalf of the *engineer* in failing to stop the train immediately as protection against a derailment when a "hot box" might be suspected, such negligence was not the *proximate cause* of the injury incurred by the plaintiff when the train was stopped by means of the conductor's emergency valve on the rear of the train, the original claim that the conductor was negligent having been withdrawn by plaintiff's counsel (App. 235). In fact, the District Court instructed the jury that no question was before them as to the conductor's alleged negligence or as to whether there was any negligent failure to maintain the car so as to prevent a "hot box" (App. 239).

VI

ARGUMENT

A. Safety Appliance Act

1. No evidence of non-compliance with Safety Appliance Act

The District Court erred in submitting to the jury the question whether there had been a violation of the Safety Appliance Act.

The sole requirement of Section 1 of the Safety Appliance Act is that the locomotive engine shall be equipped with a power driving-wheel brake and appliances for operating the train brake system, and that each train shall have a sufficient number of cars in it so equipped with power or train brakes that the *engineer on the locomotive* can control its speed, without requiring brakemen to use the common hand brake for that purpose. While the decisions have made it clear that "equipped" within the meaning of the statute requires that such equipment be not defective, still there is no requirement in the Act that trains should be equipped with a braking mechanism which would enable the control of the train from the rear thereof. The only evidence in the record is that the train in question was equipped in accordance with the statute, and that both immediately before and after the accident in question the engineer was able to control and did control perfectly the speed of the train. There is absolutely no evidence from which either a court or a jury could infer that the train was not equipped with power brakes in good working condition by which the *engineer on the locomotive* could control the train at all times (App. 99, 104, 236, 237).

The language of the statute is clear and unambiguous. The purpose of the statute is abundantly clear, when it is viewed against the historical background of the situation which existed not too many years ago, when many freight cars then in use on main line railroads had no power brake equipment at all, and, consequently, many locomotives were not equipped with power braking mechanisms. The salutary purpose of eliminating the necessity for employees scrambling among the individual cars to apply the hand brakes in order to control the speed of the train is obvious. Pursuant to the mandate of the statute, railroad trains today are universally equipped with power brake equipment to enable the *engineer on the locomotive* to control the speed of the train from the locomotive. In many instances, the railroads have gone beyond the mandate of the statute and have further provided, *solely as an emergency device,* what is known as a "conductor's valve" in the caboose of the train. Just such a device over and above any of the requirements of the Safety Appliance Act had been supplied by the defendant on the train here in question. However, all of the evidence clearly discloses that the conductor's valve is in no sense a rear-end duplicate of the braking mechanism which the engineer has at his control. By the engineer's hand in the locomotive is a calibrated device by which the speed of the train can be delicately controlled. Braking power can be applied a few pounds at a time or with full and sudden force, if an emergency should so require. Such is precisely what the Safety Appliance Act requires, that control be placed at the fingertips of the engineer. On the other hand, the conductor's valve is a mechanism designed for an entirely different purpose, to allow the escape of the air in the train line into the atmosphere, thus resulting in the "dumping" of the brakes. It is obviously essentially an emergency device—emergency in the sense that it is not to enable the conductor on the rear to control or regulate the speed of the train, but is merely to permit the conductor on the rear to bring the train to a halt, should the conductor, who is, of course, in command of the train, deem that necessary. Indeed, the railroad personnel witnesses, both for the plaintiff and the defendant, disagree among themselves as to whether it is even possible to obtain a service stop as distinguished from an emergency stop by means of the mechanism known as the conductor's valve. Any conflict which exists in the evidence on this point merely serves to emphasize the total absence of exactness of control which may be procured from the rear of the train. Precision of control from the rear of the train is immaterial; no control from the rear of the train is dictated by the Safety Appliance Act; any control so provided for an emergency situation increases the safety to employees.

At least the basic point now made by the defendant was recognized by the trial judge in his charge to the jury. He carefully pointed out that it was undisputed that the defendant had complied with the plain wording of Section 1 of the Safety Appliance Act. However, he went further and instructed the jury that the plaintiff contended that there was implicit in the Safety Appliance Act a requirement that the brakes as operated by the conductor's valve should be "efficient." The issue of such efficiency was left to the jury (App. 238).

It is respectfully and most earnestly submitted that the submission of this issue to the jury was plainly erroneous and entirely contrary to the plain wording of the Act in question. It finds support in no decision discovered by the defendant.

To be sure, it may well be that in a given case there may be a mechanical defect in a train-brake system, the result of which is to prevent the *engineer on the locomotive* from exercising control over the speed of the train, and that such defect would constitute evidence of a violation of the act. For example, in the recent Supreme Court case of *Coray* v. *Southern Pacific Co.*, 335 U. S. 520 (1949), the evidence disclosed that the threads on a valve in the brake line system were so badly worn that a nut became disconnected, resulting in the instantaneous escape of the air in the brake line, thereby locking the brakes. It was conceded that this defect constituted a violation of Section 1 of the Safety Appliance Act. Undoubtedly, this was correct, for it deprived the *engineer on the locomotive* of his required control over the train. However, it must be carefully borne in mind that the uncontradicted evidence in the instant case clearly discloses that the engineer had full control over the speed of the train immediately before the stop, at the instant of the stop, and for the duration of the run of the train thereafter (App. 99, 104). During inspections, made before and after the accident, no defects were discovered in any of the braking equipment of the train (App. 222, 223; Deft's Ex. 12, not printed). The stop in the instant case occurred, not because of any lack of control by the *engineer on the locomotive,* but, to the contrary, occurred by virtue of the use of the *additional* control exercised by the *conductor* on the rear of the train, pursuant to a policy of the railroad to furnish additional protection in the form of an emergency valve should its use become necessary. Surely, the furnishing of such additional protection cannot be construed to be a violation of the Safety Appliance Act. There is not one iota of evidence in the present record that any rough stop that may have been caused from the operation of the conductor's valve had the slightest relationship to the ability or the inability of the *engineer on the locomotive* to control the speed of the train. Indeed, as the court instructed the jury, there was not even any controversy on the fact that the train in question was equipped in precisely the manner required by the plain wording of the statute (App. 236, 237).

2. Errors in instruction in scope and applicability of Safety Appliance Act.

Even if it could conceivably be argued that there was a question for the jury as to the compliance of the power-brake system with the Safety Appliance Act, the District Court improperly instructed the jury on this issue.

As shown above, it is most earnestly submitted that the only question which, under any set of facts, could be submitted to the jury under Section 1 of the Safety Appliance Act is whether a locomotive engine is "equipped with a power driving-wheel brake and appliances for operating the train-brake system," or whether the train has a sufficient number of cars "so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." While conceivably a case may be presented wherein certain proven defects may be evidence of the ability or inability of the *engineer on the locomotive* so to control the train, yet in such a case the issue is still simply whether such control by the *engineer on the locomotive* is present. On the basis of Section 1 of the Safety Appliance Act, the issue can never be the *"efficiency"* of the mechanism for braking the train *from the rear.* The theory of such an instruction is doubly erroneous.

In the first place, as pointed out above, no section of the Safety Appliance Act even requires any mechanism for braking the train from the rear. The language of Section 1 of the Safety Appliance Act, which is the only section relating to air brakes, is detailed and specific as to the equipment required. That section, just as the other sections of the Safety Appliance Act relating to other rerequired equipment, is statutorily unique in its detailed specificity. The reason is obvious. Exact uniformity of specifications for safety appliance equipment on the intricate interlocking network of interstate railroads was considered imperative to protect the safety of employees constantly working on interchanged equipment. By the same token, such specificity of requirements assumes the exclusion of other safety devices from the mandatory, absolute liability provisions of the Safety Appliance Act.

In the second place, while the decisions construing the Safety Appliance Act leaves no doubt but that the word "equipped" must be construed to mean that the specified equipment be not defective, the term "efficiency" is a word of art employed in the Safety Appliance Act only as a requirement for one specific device. Section 11 of the Safety Appliance Act (Acts of Congress of March 2, 1903, ch. 976, § 2, 36 Stat. 298, 45 U. S. C. § 11), dealing with various safety appliances, specifically provides that "All cars must be equipped with . . . *efficient* hand brakes." (Italics added.) Such wording is significantly lacking from the air brake section of the statute. In like manner, Section 2 (Acts of Congress of March 2, 1893, c. 196, § 2, 27 Stat. 531, 45 U. S. C. § 2), dealing with automatic couplers, specifically requires that the couplings in fact *do couple* in every instance. Ladders, handholds and grab irons are required to be *secure* (Sec. 11, *supra*). Again, no such particularization appears in Section 1, the air brake section. Accordingly, it is the earnest contention of the defendant that, under no circumstances, can the duty of the railroad to provide air brake equipment require more than that such brakes be not defective. Obviously, the word of art, "efficient," carefully selected for use in Section 11, carries on its face, and particularly to a jury, an implication of a much higher duty than was actually imposed by the statute.

The limit of the content of Section 1 of the Safety Appliance Act is clearly that the specified equipment be not defective nor out of repair. *Spokane & Inland R. R. Co.* v. *Campbell,* 241 U. S. 497 (1916). Clearly the word of art, "efficiency," employed only in Section 11 of the Safety Appliance Act has an entirely different meaning. That such is the case can be no better illustrated than by the square holding of *Thayer* v. *Denver & R. G. R. Co.,* 25 N. M. 559, 185 Pac. 542 (1919), *subsequent appeal on different ground,* 28 N. M. 5, 205 Pac. 733 (1922), where it was held that even a finding by a jury, in answer to a special interrogatory, that the hand brake rigging on the car in question was not in any manner defective would not be equivalent to a finding that the car was equipped with an "efficient" hand brake. While the absence of defects is the test imposed by other sections of the Safety Appliance Act, the court held in accordance with what is obvious on the face of Section 11, that that section imposed a requirement over and above a mere absence of defects. The court pointed out at page 545 of 185 Pacific:

> "It will be noted that 'defective' is not used [in the interrogatory] as the antonym of 'efficient', *and no lexicographers, so far as we know, so use it.* It is true, there are cases which imply that 'defective' is synonymous with 'inefficient' (*Geloneck* v. *Dean Steam Pump Co.,* 165 Mass. 202, 43 N. E. 85; *Kansas City, M. & B. R. R. Co.* v. *Burton,* 97 Ala. 240, 12 South. 88. And the Supreme Court of the United States has used the word 'defective' in speaking of a coupler which failed to work (*San Antonio, etc. R. R. Co.* v. *Wagner,* 241 U. S. 476, 36 Sup. Ct. 626, 60 L. Ed. 1110), *and of air brakes which failed to function* (*Spokane, etc., R. R. Co.* v. *Campbell,* 241 U. S. 503, 36 Sup. Ct. 683, 60 L. Ed. 1125), and of ladders which were insecure (*Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874); *but in each case the language of the Safety Appliance Act was different, and there was no point made, as here, that a hand brake might be inefficient, and not necessarily defective.*" (Italics added)

We find no support in any decisions for the extension or application of the specifically chosen wording of Section 11 to the long-established wording of Section 1.

Accordingly, it is submitted that the District Court erred in submitting to the jury the question of the "*efficiency*" of the mechanism for braking the train *from the rear* and by not confining the issue to whether the equipment was such as to enable the *engineer on the locomotive* to control the speed of the train. Clearly, the proper issue was not presented to the jury.

Finally, by way of summary, it is most earnestly submitted:

A. There was positively no evidence that the equipment on the train was not such as to enable the *engineer on the locomotive* to control the train at all times. Indeed, the evidence is undisputed that both immediately before and after the accident in question the engineer was able to control and did control perfectly the speed of the train.

B. Even if it could conceivably be contended that there was evidence of a defect which deprived the *engineer on the locomotive* of control of the train, the District Court erred in instructing the jury that the issue was the *"efficiency"* of the brakes when *applied from the rear,* instead of confining the issue to whether the equipment was such as to enable the *engineer on the locomotive* to control the train.

B. Alleged Negligence of the Engineer and Proximate Cause

The District Court erred in submitting to the jury any issue of the negligence of the engineer, for the reason that, as a matter of law, any conceivable negligence of the engineer was not the proximate cause of the injury to the plaintiff.

At the outset, for the purpose of clarity, the argument of defendant on this phase of the case must be carefully separated from two other contentions, in order to delimit the narrow scope of the point here made.

In the first place, it must be emphasized that this argument of the defendant has no connection with the argument, *supra,* on the Safety Appliance Act.

In the second place, it is equally obvious that, by virtue of the conflict in the evidence in this case on the color characteristics of the smoke observed by the various witnesses, the existence or non-existence of a company rule requiring the engineer to stop immediately upon seeing the smoke, and on related matters, a jury issue would have been presented on the question whether the engineer was negligent in failing to bring the train to an immediate stop after seeing the smoke, *if, but only if,* what developed to be a "hot box" had resulted in a derailment or other similar accident to the train, and injury had resulted therefrom. Both the plaintiff and Florence, witness for the plaintiff, testified positively that the only purpose of any requirement of bringing the train to a stop when there was a suspicion of a "hot box" was to prevent the wringing off of an axle and a resulting serious accident caused by a derailment (App. 40, 41, 76). Indeed, this would seem to be obvious as a matter of common knowledge. Certainly, the engineer in choosing to test for a sticking brake would have been charged with the results of a "hot box" if he were negligent in choosing any other alternative than immediately stopping the train, *if a derailment had occurred.*

However, it is equally clear from the testimony of the plaintiff and his witness Florence, and is also equally obvious as a matter of common knowledge, that the only question which confronted the engineer in observing the smoke was whether it might indicate a condition which might cause a derailment of the train, namely, a "hot box." Admittedly, the engineer was mistaken in his belief as to the cause of the smoke; a "hot box" actually did exist. But positively no harm resulted to the plaintiff from the "hot box." The axle did not wring off, and the car on which the "hot box" had developed was removed from the train in a routine manner.

Indeed, even if reasonable minds might differ as to whether the engineer was negligent at all in pursuing the customary, preliminary test when confronted with conditions which, on the basis of his long experience, indicated a sticking brake, as distinguished from a "hot box," a discussion of any such difference of opinion is purely academic in the instant case because of absence of proximate cause. Whatever may be the practical formulation of the bounds of the doctrine of proximate cause under the Federal Employers' Liability Act, that the doctrine forms an inseparable part of the proof of a plaintiff's case is clear beyond doubt. Even assuming that facts can be shown that point to negligence on the part of the railroad, the plaintiff must go much further. Proximate cause must also be established beyond a peradventure. The subtleties long implicit in any formulation of the doctrine of proximate cause abound in every volume of all reports to the instant moment. That the basic concept of foreseeability as a condition precedent to the doctrine does not require a precise advance determination by the actor of the exact consequences that may follow his act is now well settled. Yet it is equally well settled even by the most recent decisions of the United States Supreme Court under the Federal Employers' Liability Act that "chain of causation" can not be forged from freaks, but depends basically on natural probabilities which in the last analysis must mean "foreseeability". Bare possibility is not sufficient under any test. The decisions of our courts have not been unanimous on varying facts in which they have considered the exact weight of the burden of proximate cause on a plaintiff. But that the burden is ever present is certainly undeniable. As was said by the majority of our Supreme Court in the leading case of *Brady* v. *Southern Railway Co.,* 320 U. S. 476, 483-484 (1943):

> ". . . Events too remote to require reasonable prevision need not be anticipated . . . *The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."* (Italics added)

See also the very recent cases of *Reynolds* v. *Atlantic Coast Line R. Co.,* 336 U. S. 207, (1949); *Fore* v. *Southern Railway Co.,* 178 F. 2d 349 (C. C. A. 4, 1949).

The irrefutable logic of the long relied-on, understandable test of foreseeability abundantly illustrates the error of the District Court on the facts submitted in the instant case. However, the terminology employed is immaterial. Whether the test be "foreseeability", "natural and probable consequences", or "substantial factor", the fundamental rationale does not differ. Proximate cause is common sense and its purpose is merely to exclude consideration by a jury of slips of human judgment which may have occurred at the time of an injury but which were not the cause thereof.

Of course, the cases on proximate cause are countless and since individual cases are so entirely dependent on the particular facts presented, precedents in this field are of little help. Yet it is submitted that the following two cases are good examples of countless cases setting forth the well-settled principles which govern the instant situation.

The case of *Reetz* v. *Chicago & E. R. Co.,* 46 F. 2d 50 (C. C. A. 6, 1931), is typical of the numerous cases that have passed on such situations. The *Reetz* case was concerned with the question of proximate cause under the Safety Appliance Act. It should be repeated that the defendant herein does not contend that any issue of proximate cause is raised in the instant case under the Safety Appliance Act theory submitted to the jury and accordingly, to avoid confusion, it should be emphasized that the *Reetz* case for our present purposes is relevant only to this second theory. While it is concerned with a violation of the Safety Appliance Act, it is submitted that the principle there laid down is squarely in point with the point now raised. In the *Reetz* case a train, while under way, parted due to the breaking of couplers and drawbars, thus breaking the air line and bringing the train to a stop. At the time of the stop, Reetz, the brakeman, was in the caboose. He secured his lantern and walked along the train endeavoring to locate and remedy the trouble. At a point where the train had stopped and some distance ahead of the caboose, the track passed over a narrow bridge. In attempting to walk across the bridge, Reetz fell and received injuries which resulted in his death. It was undisputed that the parting of the train constituted a violation of the Safety Appliance Act, and the plaintiff contended that this violation of the act was the proximate cause of the death of Reetz. It is perfectly obvious that any violation of the Safety Appliance Act was related to the death of Reetz in precisely the same way that any negligence of Reid, the engineer, is related to the injury to Brooks. However, the holding of the court, in line with countless decisions, was that the violation of the Safety Appliance Act was merely a condition and was not the proximate cause. Reetz could have been in precisely the same position and precisely the same result would have happened in countless other situations. The court concluded at page 52 as follows:

> ". . . there is liability only where the failure of the appliance not only creates a condition under which, or an incidental situation in which the employee is injured, but where the defective appliance is itself an efficient cause of or the instrumentality through which the injury is directly brought about. Here the incidental situation existed, but the defective appliance bore no other relation to the injury."

One of the most recent cases in the United States Supreme Court on proximate cause under the Federal Employers' Liability Act is the case of *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207 (1949). In this case the complaint alleged that a brakeman, whose duties customarily required him to cross over cars on moving freight trains, was killed on one such crossing. This crossing occurred as part of a required journey from the caboose to a car from which a signal was to be given. The signal ordinarily would have been given from the sixth car from the caboose. *The complaint charged, however, that because the railroad had negligently allowed canes to grow alongside the roadbed, the deceased could not safely signal from the sixth car and so had to cross to the seventh car in order to give the required signal.* On this additional crossing he was killed. The defendant demurred to the complaint and the sustaining of the demurrer was affirmed by the Supreme

Court of Alabama. In a *per curiam* opinion, the United States Supreme Court held that the Supreme Court of Alabama had not erred in holding that the facts alleged did not show that the accident resulted proximately, in whole or in part, from the negligence charged.

It is utterly inconceivable that the actions of the engineer in the instant case, related as they may have been to a hypothetical derailment that never occurred, could be more than an existing condition at the time the plaintiff was otherwise injured. To say that his actions were the proximate cause of plaintiff's injury is to do violence to all of the salutary logic behind the doctrine.

The fundamental fallacy of the submission of this theory to the jury is clearly demonstrated when it is recalled that the plaintiff positively testified that he and the conductor observed the smoke before they even knew that the engineer had seen the smoke or that he contemplated any action. The plaintiff and the conductor climbed down from the cupola and proceeded toward the rear of the caboose to apply the brakes. They were momentarily halted in their purpose by a belief that the engineer had seen the hot box and that he was proceeding to stop the train. However, when they then believed that he had not seen the smoke, they proceeded with their original purpose and applied the brakes. Even if it were assumed that the smoke had been at no time visible to the crew on the front of the train, precisely the same result would have occurred. Certainly, the fact that the engineer did see the smoke, made an effort to do something, even if it be assumed that he made a wrong choice, can not form the basis of the proximate cause of an event that clearly would otherwise have occurred.

Surely the plaintiff can not contend that the engineer should have foreseen danger to the plaintiff even if he should have foreseen that the conductor and the plaintiff would have followed precisely the course that they did follow when the engineer released the brakes. Certainly the evidence discloses no inherent danger in the stopping of a freight train by means of the conductor's valve. Such an emergency stop may well be rough, just as the plaintiff expected this one to be, but certainly the engineer would not consider as dangerous the operation of the conductor's valve furnished for just such purpose. In other words, even if the engineer had negligently failed to stop the train, and even if he had known as a matter of fact that his failure to stop the train would cause the conductor in the caboose to attempt to stop the train, the actions of the engineer would have been merely the condition or the occasion for the conductor to apply the brakes and would not have been the proximate cause of any injury which resulted to the plaintiff from the application of the brakes.

It is, accordingly, most earnestly submitted that under all decisions on proximate cause, regardless of the verbal formulation variously employed, it is inconceivable that the actions of the engineer in the instant case could have been more than a mere condition of the injury to the plaintiff, and clearly such was not the proximate cause of the injury.

The seriousness of the Trial Court's errors is demonstrated by the extraordinarily large verdict of $75,000. The Court saw fit to reduce this figure by one-third. Such a verdict was rendered in spite of the fact that neither the plaintiff nor his physician ever claimed more than a partial disability, and in spite of the sharply conflicting testimony by the four medical witnesses as to the cause of the plaintiff's present difficulties, the extent of his injury, the success of the remedial surgery, and the permanence of his condition.

VII

CONCLUSION

Accordingly, it is respectfully but most earnestly submitted by the defendant that both of the above theories of the court below included in its submission of the case to the jury were erroneous and that, accordingly, the judgment below should be reversed and final judgment entered for the defendant. If for any reason this Court should be of the opinion that even one of the theories was correctly submitted to the jury, since this Court cannot presume which of the two theories submitted to the jury determined their decision, the judgment below should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,211

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, A CORPORATION, *Appellant*

v.

THOMAS M. BROOKS, *Appellee*

Appeal from the United States District Court for the District of Columbia.

United States Court of Appeals
for the
District of Columbia Circuit
FILED [illegible]

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QUESTIONS PRESENTED.

Defendant's 112 car freight train, en route from Richmond to Washington, developed a blazing smoking "hot box" about mid-way in the train. This was called to the attention of the engineer, who slowed down as if to stop, but then speeded up. The conductor, to prevent a "derailment or wreck", attempted to stop the train in a normal way by use of the conductor's valve in the caboose, but it resulted in a very rough stop, throwing plaintiff to the caboose floor and causing his injuries.

In Appellee's opinion, the questions are:

(1) In view of Rule 51 of Federal Rules of Civil Procedure, may the Appellant, who did not request an instruction that Section 1 of the Safety Appliance Act only required power brakes which could be safely operated by the engineer exclusively, now object to the Court's instruction which did not so limit Section 1.

(2) The Appellee agrees Question (2) is correctly stated by the Appellant.

(3) Did the District Court err in submitting to jury the questions of whether the engineer was negligent in failing to stop the train, after his attention was called to a smoking hot box (an admittedly dangerous condition), and, whether such negligence proximately caused, in whole or in part, the plaintiff's injury, when the conductor's use of the caboose brake valve, in an effort to prevent "derailment or wreck", resulted in a violently rough stop.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11211

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD COMPANY, A CORPORATION, *Appellant*

v.

THOMAS M. BROOKS, *Appellee*

Appeal from the United States District Court for the District of Columbia.

BRIEF FOR APPELLEE.

I.

COUNTER STATEMENT OF FACTS.

The Appellee desires to make the following corrections and additions to the Appellant's Statement of the Facts.

While the attention of Reid, the Assistant Road Foreman of Engines, who was operating the engine, was called to smoke coming from the hot box on Fireman Watsons' side, on the left, Reid did not look back immediately, but waited until he got to a "right hand curve" to look if there was smoke coming from his side of the train (App. 100). After seeing smoke on both sides, he "figured it was a stuck brake", in which conclusion he was admittedly wrong. Apparently, there was an appreciable length of time between the instant Watson called Reid's attention to smoke and the time the train reached a right hand curve when Reid observed smoke from his, the engineer's side. Brooks, the plaintiff, who was in the caboose saw smoke and fire flying from the hot box, which he called to the conductor's attention, as admitted by the Answer to the Complaint (App. 3, 5).

Florence, the front brakeman on the diesel, testified that the speed of the train was reduced by Reid from 50 to 55 miles an hour to 15 miles an hour (App. 73), and, further, (App. 73):

> "the engineer released the brake, *opened* his throttle, and began to pull the train ahead just as if he were going to continue on his journey and he was pulling at the time—we were running about twenty-five miles an hour when we came to a very abrupt stop and the train stopped * * * about two miles from the point of the first application * * *."

The kind of stop resulting in the plaintiff's injury, was described by him (App. 31):

> "It was rougher than any other I have ever experienced in my career of railroading."

and by Florence, the front brakeman (App. 74):

> "It was comparable to running into a brick wall with an automobile at a terrific speed."

and by Reid, who said he was running 40 miles an hour, (App. 101):

> "Very rough, yes sir."

Although the plaintiff anticipated some roughness, because of its unusual severity, he could not retain his hold on the grab irons and was thrown nine feet to the wall of the caboose (App. 54).

Before the conductor applied the brakes from the caboose, the following events occurred: (1) Brooks, the plaintiff, who was in the cupola of the caboose with Cunningham, the conductor, observed smoke and fire from his side of the train as it rounded a curve; (2) he called this to the attention of Cunningham; (3) the conductor came down the steps of the cupola and started out to the rear platform of the caboose to apply the brakes by using the conductor's valve; (4) Brooks started down too, but then felt the brakes being applied by reduction of the air, and, looked at the gauge which showed the brake application; (5) Brooks called this to Cunningham's attention, and both assumed the engineer had seen the smoke of the hot box and they, therefore, did not then apply the brakes from the rear; (6) after proceeding some distance with the brakes applied, Reid released the brakes, opened the throttle and speeded up with the car still smoking; (7) Cunningham felt the train speed up, and realizing the danger, applied the air brakes by use of the conductor's valve, taking a minute and a half to two minutes to open the valve; (b) the violent stop occurred.

In reply to a question by Appellee's counsel as to why Reid applied the brakes he said (App. 100):

> "As I thought we had what is known as a stuck brake, and that is one method of releasing a stuck brake without stopping the train. Q. Will you tell us how that can be done? A. By making a full service application, and then releasing the brakes. Q. Does that often cure sticking brakes? A. Very often, yes, sir."

Neither Reid nor anyone else testified the speeding up by the application of power, after the brakes were released, was any part of the procedure used in freeing stuck brakes.

The Appellant is correct in stating that there was a difference of opinion as to the brake pressure when the train left Richmond. Front brakeman, Florence, testified that they had sixty pounds on the diesel engine, which was ten pounds less than the amount he thought was required (App. 90). All of the witnesses, with one exception, testified the required braking pressure was seventy pounds (App. 38, 90, 215), and that one exception was Reid, the instructor, who testified that on the new diesels (one of which he was operating) eighty pounds was required (App. 109); but, he had not communicated this fact to a single person on the crew or to any of the inspectors, who were charged with the duty of making sure the train had this required braking pressure before it left Richmond. Appellant's witness, Parrish, the car inspector who tested the brakes for a train line leakage, among other things, didn't know the maximum permissible leakage. He was asked (App. 209):

> "Q. What is that permissible train line leakage? A. I don't exactly know what it is."

To another question, he said (App. 205):

> "If he gets about fifteen or twenty pounds there, they call it a bad train line and lots of times they make us go over the train and look for leaks."

Mr. Carlson, the Westinghouse Air Brake employee, called as an expert by the Appellant, testified that the maximum permissible train line leakage was seven pounds (App. 145).

Florence, the front brakeman, upon discovery of the smoke, believed it was a hot box and so notified Reid, who was operating the engine, by sticking his head out of the window and putting one hand to his nose, and, with the other hand, pointed to the journal, which is the signal for a hot box (doubtless because of the peculiar odor). When the car was taken out of the train, the journal box was on fire and blazing, and the axle was cherry red (App. 77). It would have been highly dangerous to have proceeded with the car in this condition (App. 198); therefore, since the car could not have been used, it was "set off" and the train proceeded to Washington without it.

The Appellant's brief is somewhat in error wherein it states that the plaintiff submitted to medical and surgical treatment over several months. He was treated for six and a half weeks before the operation for a spinal fusion was performed on January 28, 1950, whereby an attempt was made to fuse three vertebrae together by chiseling off part of the bone in his back and applying some bone from a bone bank, plus the use of four metallic screws; that he was hospitalized for two months and then wore a plaster of paris cast for three and a half months, and then fitted with steel braces and an elastic support, which he still wears. Dr. Gutman testified that Brooks did not have a solid fusion, the absence of which would cause continued pain, and therefore, he suggested another fusion operation (App. 64). The plaintiff had not been able to do any work up to the time of trial.

II.

STATUTES AND RULE INVOLVED.

Federal Rules of Civil Procedure.

§51. **Instructions to Jury: Objection.** At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. (Title 28, U.S.C.

Safety Appliance Act.

§1. **Driving-wheel brakes and appliances for operating train-brake system.** It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. (Act of March 2, 1893, Chap. 196, Sec. 1, 27 Stat. 531: 45 U.S.C. Sec. 1).

Federal Employers' Liability Act.

§51. **Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.** Every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children or such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Act of April 22, 1908, Ch. 149, Sec. 1, 35 Stat. 65; amended August 11, 1939, Ch. 685, Sec. 1, 53 Stat. 1404; 45 U.S.C. Sec. 51).

III.

SUMMARY OF ARGUMENT.

A. Claim of Error for Not Restricting Air Brakes to Use of Engineer Alone, Comes Too Late. Rule 51, Federal Rules Civil Procedure.

Appellant may not, now, for the first time, claim error because the Trial Court did not restrict application of Section 1 of the Safety Appliance Act, relating to power brakes, to the use of such brakes by the engineer alone, in the absence of a timely request or objection.

B. Safety Appliance Act.

1. Air brakes which can be safely used by the engineer alone, is not compliance with the Safety Appliance Act.

Because of the preliminary question raised under Rule 51, F.R.C.P., the Appellee feels, it will not be necessary for the Court to consider the Appellant's principal contention under this heading, viz: air brakes do not have to operate safely for anyone but the engineer. Should the Court, however, wish to consider this matter, it will be found the wording of Section 1, its historical background, the purpose and intent of Congress, and the construction placed upon the Safety Appliance Act by the Supreme Court, conclusively negative the Appellant's restrictive construction.

2. Air Brakes must operate efficiently to comply with Section 1.

Appellant takes the position that "efficiency" is a word of art, which cannot be used in describing the Statutory requirements of Section 1, and claims that the proper test is that the braking system "be not defective nor out of repair" (Brief 21).

Appellant concedes it is not necessary to show negligence to constitute a violation of Section 1 (App. 14) and, admits (App. 13):

> " * * * the brakes with which the train is equipped must be in good and proper working order to satisfy the requirements of the Statute".

There is no difference between the requirement that the brakes must operate efficiently, and, the Appellant's admission coupled with the Supreme Court's findings that air brakes must operate properly without defect, regardless of negligence, and must operate on the occasion in question.

C. Negligence of Engineer and Proximate Cause.

An engineer operating a train of 112 cars, over a mile in length, who fails to bring it to an immediate stop, upon discovery of smoke, which came from a blazing and smoking hot box, is guilty of negligence proximately causing, in whole or in part, an injury resulting from a brake application by the conductor in the caboose, to avoid the danger of wreck or derailment, rendered imminent, by reason of the engineer's negligence in failing to stop.

IV.

ARGUMENT.

A. Claim of Error For Not Restricting Air Brakes to Use of Engineer Alone, Comes Too Late. Rule 51, Federal Rules Civil Procedure.

This point not having been raised by timely objection to the Court's granting of Plaintiff's Prayer for Instruction No. 1, or, objection at the conclusion of the Court's charge, the Appellant's afterthought comes too late.

At a discussion with the Court and counsel for the Plaintiff and Defendant, before any testimony was taken, for the purpose of apprising the Court of the basis of the Plaintiff's claim as well as points of defense, Defendant's counsel made the following statement (App. 13):

> "I think there is a difference between the requirements of this section and the requirements under the hand brake section where the statute itself actually says it shall be equipped with an efficient hand brake but, for all intents and purposes, we admit that the brakes with which the train is equipped must be in good and proper working order in order to satisfy the requirements of the statute."

Testimony brought out in the Plaintiff's case was restricted to points involved in this discussion, and it is a reasonable assumption that the Court's rulings were made in the light of the understanding. Nowhere during the entire course of the trial, did Appellant request the Court to make the limitation it now seeks. Had it done so, Plaintiff might have offered, *inter alia,* evidence showing the two conductor's valves (App. 74) are used constantly for the stopping of trains and are standard equipment for a caboose.

The Appellant's brief is the first time Appellee's counsel has seen or heard this argument advanced. We believe it was not simple inadvertence, but the recognition that no such narrow construction has been allowed by the Supreme Court.

In *Palmer* v. *Hoffman,* 318 U. S. 109, 63 S. Ct. 477 (1943), the Supreme Court, speaking through Mr. Justice Douglas, at page 483, said:

> " * * * In fairness to the trial court and to the parties; objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

See also Federal Practice and Procedure, Barron and Holtzoff, Rule 51, Section 1103, page 797.

The railroad preserved its right to object to the Court's instruction on the ground "efficiency" rather than "defective" was used, but, beyond this, it cannot go.

B. Safety Appliance Act.

1. Air brakes which can be safely used by the engineer alone, is not compliance with the Safety Appliance Act.

Under this heading, the Appellant's first contention is that Section 1 of the Act does not require properly functioning air brakes for use by anyone but the engineer on the locomotive.

An analysis of this Section, shows it to be divided into two parts:

> "It shall be unlawful for any common carrier engaged in Interstate Commerce by railroad, to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, OR to run any train in said traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on a locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose".

The first part requires a power driving wheel brake and appliances for operating the *train brake system,* and, the second part requires a sufficient number of cars in a train equipped with power or train brakes, to enable the engineer to control its speed without requiring the brakemen to use the hand brake.

If a locomotive is being used in interstate traffic, it can only mean being used in a movement of cars, or, an interstate train movement. "Appliances for operating the train brake system" cannot be limited to the locomotive engine alone, for the reason that each and every part of the train brake system fits together in an inseparable pattern, which can only function as an integrated apparatus. If the triple valve on a car is bad, the train brake system will not function, whether it be the triple valve on the car next to the engine or on the 100th car (App. 94 and 95); if there is an abnormal leakage in the train line, by which means air passes from the engine to the last car through pipes and hoses, sufficient air pressure cannot be maintained to operate the train brake system, "and would constitute an inefficient braking system" (App. 143); or, if there is a leak in any one of the conductor's valves in the caboose (part of the train line equipment, App. 110), it will affect the operation of the train brake system (App. 111). By the same reasoning, the second requirement of Section 1 would be violated, if any car had a leaky hose, had a bad triple valve, or a leaky conductor's valve on the caboose, because any one would make the whole system ineffective and there would not be a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train could control its speed.

Section 1 does not say that the appliances for operating the train brake system shall have to function *only* when used by the engineer on the locomotive. To give it this construction, would place the air brake system outside of the Safety Appliance Act, when, for instance, the engine, instead of *"drawing"* the train, was *"pushing"* the train. Many train movements are made by the engine being headed against the train and pushing the cars in front of it. Thus, since the Act says drawing the train, the rationale of the Appellant's reasoning is that, because the train was being pushed and not drawn, the Safety Appliance Act would not apply. The same strict construction would be inherent if the fireman, for instance, was operating the locomotive (as he is required to do in order to qualify for an engineer) or, if a hostler (who habitually moves engines in the yard) would be operating the engine, because he would not be the locomotive engineer.

It could hardly be contended that Section 1, having to do with air brakes, was not intended to be inclusive, insofar as the air braking system of a train is concerned. No other Section of the Safety Appliance Act relates to air brakes.

The Appellant attempts to bolster its argument, by showing the "purpose and historical background" of Section 1 of Safety Appliance Act, saying that not too many years ago, freight cars used on main line railroads had no power brakes and individual employees had to scramble among and on the cars, to apply the hand brakes (Brief 16 and 17). The Appellee agrees, consideration of these two elements, is most appropriate. It is submitted, however, the purpose of Section 1 of the Safety Appliance Act, was not *only* to avoid the necessity of brakemen scrambling over cars in an effort to control the speed of a train by the use of a common hand brake, but, also, as a safety measure for employees and the traveling public. The Interstate Commerce Regulations as to the number of cars required to have power brakes, as mentioned on page 13 of Appellant's Brief, states:

> "* * * that to more fully secure the objects of the act to promote the safety of employees and travelers on railroads, the minimum percentage of power brake cars to be used in trains, as established by its order of November 15, 1905, should be further increased * * *."

To the same effect is the case of *Coray* v. *Southern Pac. Co.,* 335 U. S. 520, 69 S. Ct. 275 (1949), in which the court, speaking through Mr. Justice Black at p. 276 says:

> "* * * An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees and others as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances."

Appellant states (Brief 17):

> "Pursuant to the mandate of the Statute, railroad trains today are universally equipped with power brake equipment to enable the engineer on the locomotive to control the speed of trains from the locomotive. In many instances, the railroads have gone beyond the mandate of the Statute and have further provided solely as an emergency device, what is known as the conductor's valve on the caboose of the train."

Since the Appellant goes outside of the record, it would not seem amiss for the Appellee to do so. The Richmond, Fredericksburg and Potomac Railroad will find that practically all of its cabooses are equipped not only with one, but two (one at either end—App. 102) and, in many cases, three conductor's valves as was this caboose (one in the cupola—App. 119), in addition to an air gauge by which the conductor or brakemen in the caboose can determine the reduction of air being made in pounds, either by themselves using the valve on the rear, or, by the engineer. There is no testimony that conductor's valves are not standard equipment on all cabooses. It is definitely a part of the *braking system* of the train. Every member of the crew has to be familiar with the operation of air brakes, and use it every day (App. 37). The same air that is pumped into the train line by the compressors on the engine, passes all the way back to the caboose (App. 37). Any leakage in the conductor's valve on the caboose would be a leak in the brake system and would thereby prevent the engineer from getting proper pressure to apply the brakes (App. 111).

There is no evidence that these valves are supplied and used solely as an emergency device: in fact, they are usually referrred to as a "conductor's valve". They are also used by the conductor or brakemen on reverse movements, and have a whistle so that the operator, whether it be a brakeman or conductor, can sound the whistle as the train is being shoved across a road crossing (App. 46). Could it be contended that, in such a reverse movement, when the engineer may not, because of the track curvature or obstructions, be able to see the leading or first car, the Safety Appliance Act does not require safe operation of the air brakes from the rear?

The function of conductor's valves becomes increasingly important, in the light of surprising testimony, that there is no means of a communication between the engineer and the crew in the caboose and vice versa (App. 77). Where the crew in the cupola of the caboose observe an unusual condition, it being their duty to do so under existing rules (App. 3, 5), the only means the conductor and brakemen in the caboose have of doing something about a dangerous condition is the application of the brakes from the rear of the train by means of the conductor's valve.

The Appellant claims (Brief 17) the conductor's valve is a device for "dumping" the air only—in other words, discharging the air all at one time. This is contrary to the testimony of the witnesses, both plaintiff and defendant, who say the air can be discharged gradually (App. 53) and a smooth stop secured (App. 45, 75, 78, 128, 129, 144). It is a device, says the railroad, (Brief 17):

> "to permit the conductor on the rear to bring the train to a halt should be conductor, who is, of course, in command of the train, deem that necessary".

Implicit in the Appellant's reasoning, is the proposition, that any time the train is brought to a stop from the rear, regardless of what kind, there could be no violation of the Safety Appliance Act. If the conductor's valve could only be used for "dumping" as claimed, it would obviously always produce a violent stop as described by the witnesses, so that the conductor, if he observed a dangerous condition such as a "hot box", would have the choice of letting the train proceed to derailment or wreck, or else, place his life in jeopardy, together with personnel in the caboose, by "dumping" the air with the conductor's valve and thus produce a violent "run in" (App. 75) which might in itself cause a wreck. If the railroad's reasoning is to be adopted, this is the only choice left to the conductor, because of the claim that Section 1, the only section covering air brakes, excludes operation from the rear. By the same reasoning, no protection would be afforded under the Safety Appliance Act if the conductor's valve did not function at all, and because of a "hot box", the train was wrecked or derailed.

Just why it isn't possible (if the brakes are operating properly) to get a smooth stop by use of the conductor's valve, no one has satisfactorily explained. The absence of calibrated valves would not be important, since the air gauge would show the amount of reduction being made from the gradual opening of the conductor's valve. In the case at bar, it was so made by the conductor, as evidenced by the fact that he took a minute and a half to two minutes to discharge the air, to get a smooth application, which he would have gotten had the braking system been working properly (App. 128).

It seems idle to press the argument that air from the conductor's valve can only be "dumped" all at one time, because it is not borne out by the testimony. Drawings of the valve made by the witnesses, plus their description of it, show it to be similar to the ordinary household faucet, in that it can be opened as much as desired.

2. Scope and applicability of Safety Appliance Act.

Under this heading, Appellant contends that exact uniformity of specifications for safety appliance equipment, was considered imperative and since no section of the Safety Appliance Act requires any mechanism for braking from the rear of the train, it could not be liable for its inefficiency even if it were supplied. An examination of Section 1 of the Act shows no specification of the equipment required. There couldn't be, because the Act was passed in 1893, which was before most modern improvements to air brake equipment were available. Section 1, however, is as inclusive as can be, viz: *"appliances for operating the train-brake system"*. What appliances are required is not specified, but these requirements would change with the advent of new equipment. In the same way that the railroad, in this case, used a new modern diesel with cross-compound pumps capable of producing 80 pounds of pressure in a train line of 112 cars, a small steam locomotive with compressors capable of producing only 40 or 50 pounds of air in the train-brake system of a train 112 cars long, would not have been a proper appliance for operating the train-brake system. It is difficult to follow a contention which has for its basis, the proposition that three conductor's valves in its caboose, cannot be part of the "appliances for operating the train brake system" or cannot be equipment of the cars.

The Appellant's second point, under this heading, is that the term "efficiency" is a word of "art" used in Section 11, "efficient hand brakes", which cannot be used in prescribing the requirements of the operation of air brakes, and the Act simply requires "that the specified equipment be not defective nor out of repair". (Brief 21). While it is true that Section 1 does not contain the word "efficient", the Supreme Court, in its broad definition of the term, includes the situation presented in the case at bar. In *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334 (1947), the plaintiff recovered judgment as a result of injuries sustained when applying a hand brake. He based his action on Section 11 of the Safety Appliance Act. Several issues were presented which narrowed down to a violation of the Safety Appliance Act. The Supreme Court, in reversing the Appellate Court, at page 1338, says:

> " * * * Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate.*
>
> *The inefficiency of the brake in this case may have consisted of its defective condition or its defective functional operation* resulting, in either case, in its knocking from the brake platform an experienced railroad man attempting to tighten or set the brake in the customary manner described in his testimony." (Italics supplied)

It would seem the *Myers* case, decided by the Supreme Court in 1947, is a sufficient reply to the Appellant's citation of *Thayer* v. *Denver & R. G. R. Co.*, 25 N. W. 559, 185

Pac. 542 (1919), in which the New Mexico Court held a finding by a jury that the hand brake rigging was not defective, would not be equivalent to a finding that the car was equipped with an "efficient" hand brake.

Hand brakes are utilized principally when the cars are individually controlled and "to stabilize a car on the track or siding" (App. 77). Yet in this simple operation, Section 11 requires that hand brakes be efficient. Could it be said that Section 11, covering the operation of hand brakes "when cars are in use", is more important than the effective control by air brakes of an entire train?

The *Myers* case is the last Supreme Court case and one of many which have uniformly held that one way of showing an inefficient brake is to show that it failed to function in the usual way when applied in the usual and customary manner. In the instant case not only was the brake shown to be "inefficient" in that it did not operate in the manner intended when applied in the usual manner, as evidenced by the rough and violent stop, but the reasons for this failure were supplied by the defendant. Mr. Reid testified 80 pounds of air was required to operate the new diesel braking system and that he had 80 pounds when leaving Richmond (App. 109), whereas everyone else including the inspectors charged with the duty of seeing the train line pressure was proper, thought only 70 pounds was required (App. 38, 90, 215) and defendant's engine inspection reports all show a 70 pound pressure reading. Mr. Florence, the front brakeman, testified that when leaving Richmond they had a fraction less than sixty pounds of air on the diesel (App. 90); so, instead of the ten pounds below the required braking pressure, they had, in fact, twenty pounds less than the amount Mr. Reid said was required. Mr. Carlson, the defendant's expert, testified that abnormal brake pipe leakage would account for a differential between the front and rear and would cause a rough stop. (App. 143, 144). It therefore appears the braking system was *inefficient and defective* when the train started out from Richmond, immediately following the so-called inspection.

The railroad argues (Brief 21) that no words of particularization, such as that which appears in Section 2, dealing with automatic couplers, "do couple in every instance", appears in Section 1, the air brake section. An examination of Section 2 shows it does not include the words "do couple in every instance". In the case of *O'Donnell* v. *Elgin, J. & E. Ry. Co.,* 338 U. S. 384, 70 S. Ct. 200 (1949), the Court at page 203 said:

> "A close and literal reading of the Safety Appliance Act, 45 U.S.C. Sec. 2, 45 U.S.C.A. Sec. 2, suggests that two functions only are required of couplers; that they couple automatically by impact and that they uncouple without requiring men to go between the ends of the cars.
>
> * * * We find it difficult to read the Safety Appliance Act to require that cars be equipped with appliances which couple automatically by impact and which may be released without going between the ends of cars, but which need not remain coupled in the meantime.
>
> * * * As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care were to be considered on the question of this liability."

It will be noted that the Supreme Court did not stop with a close and literal reading of the Safety Appliance Act, but interpreted the coupler section in light of congressional intent and obvious purpose.

Section 2 is construed to mean not only couplers which couple on impact, but also couplers which remain coupled and which will not unintentionally come uncoupled at any time, and, the fact that they may operate most of the time or be efficient most of the time is not enough. *Affolder* v. *New York, C. & St. L. R. Co.*, 339 U. S. 96, 70 S. Ct. 509 (1950), *Carter* v. *Atlanta & St. Andrews Bay Ry. Co.*, 338 U. S. 430, 70 S. Ct. 226 (1949). In the *Affolder* case Mr. Justice Clark at page 510 says:

> "Nor do we think that any question regarding the normal *efficiency* of the couplers involved is in any action under the Safety Appliance Acts. As we said in O'Donnell v. Elgin, Joliet & Eastern R. Co., 1949, 338 U. S. 384, 70 S. Ct. 200, and the Carter case, 338 U. S. 430, 70 S. Ct. 226, the duty under the Acts is not based on the negligence of the carrier, but is an absolute one requiring performance "on the occasion in question". (Italics supplied)

The term "efficiency" does not appear in Section 2; nevertheless, in the *Affolder* case the opinion states that even "normal efficiency" is not involved—the reasonable inference being that efficiency is required on all occasions and at all times.

The efficient operation of air brake equipment has become increasingly important as the length of trains increased. When Section 1 was passed in 1893, freight trains of over a dozen cars in length were a rarity. Since that time, with the new powerful diesels, they have increased tremendously in length. In the instant case, the train consisted of 112 cars over a mile in length. The brakes of a train of this size are operated by the air supplied by compressors on the engine, which is pumped through the pipes and hoses, called a train line, and the same train line carrying the air operates the brakes on the first car as well as on the 112th car. It would be difficult to visualize anything more important in the control of a train of this length, moving at high speed than air brakes, which would operate properly and efficiently under all conditions, including operation from the rear.

The case of *Spokane & Inland R. R. Co.* v. *Campbell*, 241 U. S. 497 (1916), cited on page 21 of the Appellant's Brief, is hardly authority for the proposition that Section 1 is limited to the requirement that the specified equipment be not defective nor out of repair. The case does not seem to mention *specified equipment.* The issue of "efficiency" vs. "defectiveness" was not involved or passed upon in the case. However, it is interesting to note from that case (p. 505) that as early as 1916 the Supreme Court recognized "it is, of course, settled that if equipment was in fact defective or out of repair, the question whether this was attributable to the company's negligence, is immaterial."

Appellant (Brief 18 and 19) and by way of summary (Brief 23) claims there was no evidence that the equipment on the train was not such as to enable the engineer on the locomotive to control the train at all times. If the Court should feel it necessary to have answered an argument, which has for its basis, the conteniton that the air brake system need be safe only for use by the engineer, where the railroad itself deems control by somebody else so important that it places two or more valves on the caboose, in addition to an air gauge for the use by the conductor, it is submitted that at the time the conductor is utilizing the brake valves, he is taking control away from the engineer for the obvious reason that the discharge of air through the conductor's valve for the purpose of applying the brakes, would prevent the engineer from effectively operating the brakes. A marked similarity of lack of control is shown by the case of *Coray* v. *Southern Pac. Co.,* 335 U. S. 520, 69 S. Ct. 275 (1949) in which suit was brought in the Utah State Court under the Safety Appliance Act and Federal Employers' Liability Act for the decedent's death, when a motor car operated by him crashed into the back of an 82 car freight train, both being operated in the same direction. The train unexpectedly stopped just before the crash, because the air in its brake line escaped and locked the brakes, due to the fact that threads on a *valve* were so badly worn that a nut became disconnected. As a result of the sudden stop, the motor car, which was several hundred feet in the rear of the freight train, crashed into it. The decedent, operating the motor car, apparently did not apply the brakes as his attention was devoted to his duty of inspecting the wires. The lower court directed a defendant's verdict, which was affirmed on appeal. The Supreme Court of the United States, in reversing, at page 276, said:

> "First. We cannot agree with the State Supreme Court's holding that although the railroad ran its train with defective brakes, it thereby 'violated no duty owing' to the decedent. That Court said that the object of the Safety Appliance Act 'insofar as the brakes might be concerned, is not to protect employees from standing, but from moving trains'. We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees and others as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances".

The Appellant argues in the *Coray* case, that because the nut became disconnected, which caused the escape of air, resulting in the locking of brakes that this affected the ability of the engineer to control the brakes. Even if control by the engineer was involved, there was nothing in the *Coray* case to show the accident was caused either by the engineer's application of the brakes or by his failure to do so. On the contrary, it was shown that the brakes went into emergency because of a defective valve causing a sudden stop of the train.

In the instant case, to the extent that the conductor operated the brake, he took control away from the engineer, and he, the conductor, became the engineer, whether assistant, supplemental or otherwise, by reason of his admitted position as conductor in charge of the train.

Another important factor, mentioned nowhere in the Appellant's Brief or Statement of Facts, is that the emergency application, which resulted from use of the conductor's valve in the caboose, immediately cut off the power in the diesel locomotive by means of the mechanism known as the P. C. Switch (an abbreviation for "power cut-off switch") (App. 101). After this is done, the engineer has no control of the diesel—he can't start it; he can't apply the brakes, he can't release the brakes. He can only place the brake valve in lap position and close the throttle to idle, in order to get the P. C. light out, since the light must be out before he is able to get the power to pump up the air in the braking system (App. 104). Until this is done, he cannot release the brakes from an emergency position. How long this would take is a matter of conjecture. With the marked differential of pressure between the engine and the caboose, given as 30 pounds in the hypothetical question given by Defendant's Counsel to Mr. Carlson, the expert (App. 135), it is reasonable to infer that it would have taken a considerable period of time. Had the anticipated and desired service application occurred by the use of the conductor's valve in the caboose, there would have been a service application on the engine and the motors would not have been cut off. (App. 91).

C. Negligence of the Engineer and Proximate Cause.

The Appellant states (Brief 23):

> "* * * it is equally obvious that, by virtue of the conflict in the evidence in this case on the color characteristics of the smoke observed by the various witnesses, the existence or non-existence of a company rule requiring the engineer to stop immediately upon seeing the smoke, and on related matters, a jury issue would have been presented on the question of whether the engineer was negligent in failing to bring the train to an immediate stop after seeing the smoke, if, but only if, what developed to be a "hot box" had resulted in a derailment or other similar accident to the train, and injury had resulted therefrom."

In other words, if Brooks and Cunningham, in the caboose, had been derelict in their duty and not observed the smoke and fire of the hot box, or, had they seen it and done nothing about it until a derailment occurred, the engineer would have been charged with negligence proximately causing the accident. With this reasoning, the Appellee agrees. The defendant, however, attempts to avoid its logical sequence by arguing that since Cunningham brought the train to a stop by use of the conductor's valve provided for that purpose to prevent "a derailment or other similar accident", this occurrence was so remote that it broke the chain essential for "proximate cause". The fallacy of such reasoning is demonstrated by the fact that with no means of communication between the engine and the caboose, Reid knew everything he did would be interpreted and construed in the caboose. Thus, when Reid made a brake application which reduced the speed from 50-55 miles per hour to 15 miles per hour (App. 73) in the attempt to release a "stuck brake" (which in fact did not exist), he knew the brake application and slowing down would be felt by the conductor and brakeman in the caboose. Reid, the instructor with thirty-eight years of railroad experience, would certainly know if the smoke coming from the train approximately a half mile away, was of such proportion that it came from both sides of the train and was seen by Watson and Florence as well as himself, that in all likelihood it would have been seen by those in the caboose; particularly, since the smoke and peculiar odor emitted by a hot box would be more apparent to those on the rear than on the front. Even if Reid thought they might not have seen it, he knew that by applying the brakes and reducing the speed by more than half, on an obviously fast freight movement, it would have been equivalent of saying to those in the caboose—I saw the hot box, realize its danger and am going to stop in accordance with the rules. Then after proceeding for some distance at the reduced speed with the brakes applied, Reid released the brakes, applied the power and speeded up to 40 miles per hour (App. 101).

The speeding up was not part of Reid's plan for releasing sticking brake (App. 100):

> "Q. What was the air pressure when you commenced to make that reduction?
>
> A. 80 pounds as shown by the gauge of the locomotive.
>
> Q. And making that 15 pound reduction, I assume it went down to about 65 pounds?
>
> A. That is right.
>
> Q. Why did you do this, Mr. Reid?
>
> A. As I thought we had was is known as a stuck brake, and that is one method of releasing a stuck brake without stopping the train.
>
> Q. Will you tell us how that can be done?
>
> A. By making a full service application, and then releasing the brakes.
>
> Q. Does that often cure sticking brakes?
>
> A. Very often, yes, sir."

Why he speeded up before even looking to see that the smoke, which he thought came from a sticking brake, had subsided and which was the way he could tell whether or not his attempt to reduce the stuck brake had been successful, is a secret that seems to be in the same category as his reason for failing to tell anyone of the eighty pounds pressure requirement on the new diesels. His action in speeding up could not have been more deceptive had he deliberately tried to mislead the crew on the rear.

The Appellant cites four cases in support of its contention that chain of causation cannot be forged from freaks, but depends basically on natural probabilities, which in the last analysis, must mean foreseeability (Brief 25). They are:

Brady v. *Southern Railway Company,* 320 U. S. 476, 64 S. Ct. 232 (1943). Decedent, a brakeman and member of the crew engaged in switching, was killed when the car on which he was riding was derailed, when it struck the derailer from an unexpected direction. The derailer had been open to facilitate switching movements, but someone had closed it prior to the movement of the car in question. The opinion indicates that there was no evidence anyone other than the decedent had closed it. Among other things, negligence was claimed on the ground that the rail opposite the derailer was "so worn on top and sides that it permitted the thrust of the east wheels of the car, as they rose over the wrong end of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars * * *." The Supreme Court of North Carolina reversed judgment for the Plaintiff, and, was affirmed by the Supreme Court of the United States, which, at page 483, 236, stated:

> "* * * There is no evidence of the unsuitability of rail for ordinary use.
>
> The Supreme Court of North Carolina was of the view that the striking of a derailer from an unexpected direction was so unusual, so contrary to the purpose of the derailer, that provisions to guard against such a happening was beyond the requirement of due care. With this we agree."

Fore v. *Southern Ry. Co.*, 178 F. 2nd 349 (1949). Fore was machinist helper, and, injured his shoulder while unscrewing a nut on a locomotive, which a shorter co-employee was unable to reach. He filed no claim for more than ten months and not until his employment was terminated with the railroad. At the close of the evidence, Defendant filed motion for directed verdict on which the trial judge reserved decision, but, granted the motion after jury brought in verdict for the plaintiff. The only evidence of negligence was that sometimes an acetylene torch was used to remove the nut which Fore was attempting to remove with a wrench. The Court of Appeals, in affirming, through Circuit Judge Dobie, pointed out there was no evidence the nut was corroded, and, at page 353, said:

> "Here Fore offered no evidence whatever even to prove any element of foreseeable danger in carrying out the order in question."

Reetz v. *Chicago & E. R. Co.,* 46 F. 2nd 50 (CCA 6, 1931). This case, decided more than twenty years ago, was differentiated in *New York, C. & St. L. R. Co.* v. *Affolder,* 174 F. 2nd 486 (CCA 8, 1949). In the latter case, the facts as given in the opinion, show Affolder was a field man on a crew engaged in switching; because of the failure of the cars to couple on impact, the forward section rolled away from the main body of cars on a subsequent movement. Affolder, who stated that there was a rule of the company requiring employees to try to stop cars under such circumstances, ran toward the loose cars to set a brake to stop them. He stepped on something and fell under the cars, as a result of which he lost his leg. The Defendant conceded the cars did not couple, but said it was because one of the switchmen failed to open the coupler. The jury found in favor of Plaintiff for $95,000, which was reduced by a remittitur to $80,000. In passing on Defendant's contention that there was no evidence the failure of the couplers to couple on impact was the proximate cause of the Plaintiff's injury, the Circuit Court, at page 492, said:

> "The continuity of the cause was not broken by the plaintiff's exercise of his own volition in going from a point of safety in the exercise of his duty. It has long been settled that the chain of causation is not broken by an intervening act which is a normal reaction to the stimulus of a situation created by negligence. The rule applied in * * * Reetz v. Chicago & E. R. Co., 6 Circ., 46 F. 2nd 50 * * *, that where a violation of the Safety Appliance Act is not a proximate cause of the injury but merely creates an incidental condition or situation in which the accident otherwise caused results in the injury, there can be no recovery, is not applicable to the facts of this case."

However, the Circuit Court of Appeals, reversed, because it was of the opinion the charge did not set forth the railroad defense that the switchman had failed to open the coupler. The Supreme Court of the United States (339 U. S. 96, 70 S. Ct. 509, 1950), affirmed the position of the

Circuit Court of Appeals that proximate cause existed, but reversed and reinstated the verdict of the trial court on the ground that the trial court's charge, adequately set forth the railroad defense.

Reynolds v. *Atlantic Coast Line R. Co.*, 336 U. S. 207, 69 S. Ct. 507 (1949). The facts, as stated in the Appellant's brief, are substantially correct.

It is significant that in the *Reynolds* case, where the claim of negligence and proximate cause was that a signal had to be given from the seventh car instead of the sixth car, because canes had been permitted to grow in the roadbed, *four* Supreme Court justices dissented, as they did in the *Brady* case, supra. In the *Fore* case, supra, the directed verdict and affirmance appears based on the fact there was no primary negligence, and, therefore, is of little help on the question of proximate cause. The *Reetz* case, supra, is only helpful for the facts given in that precise situation, as pointed out in the *Affolder* case, supra. The cases selected by the Appellant in support of his position, were based upon facts and circumstances extremely remote; however, they would, by inference, be authority for the proposition that if there is any doubt about the relationship of the negligence to the result, it is a jury question. In fact, the cases so say. In *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 63 S. Ct. 1062 (1943), the Court, speaking through Justice Douglas, at page 1064, said:

> " * * * To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The Railroad contends (Brief 28):

> "Even if it were assumed that the smoke had been at no time visible to the crew on the front of the train, precisely the same result would have occurred. Certainly, the fact that the engineer did see the smoke, made an effort to do something, even if it be assumed that he made a wrong choice, cannot form the basis of the prox-

> imate cause of an event that clearly would otherwise have occurred.''

Assuming, for the same of argument, that the smoke at no time had been visible to the crew on the front, the same result *would not have* occurred, because the conductor could have made a smooth stop had the braking system been working properly (App. 144). It is the Defendant's theory that, even though the engineer saw the smoke and made a service application of the brakes, it could not form the basis of proximate cause, since the same result would have occurred, inasmuch as it is impossible to secure a smooth stop from use of the conductor's valve on the rear. This theory is defeated by testimony of the Defendant's own witness, Mr. Carlson, who testified (App. 142) that where the air pressure in the caboose has been reduced by a brake application from the engine shortly before the use of the conductor's valve, it will produce a rough and violent stop. Thus, the fact that he did see the smoke, made an effort to release the stuck brake, but increased the speed without looking back at the car in question to assure himself the smoke was eliminated, set in motion the action of Cunningham in using the conductor's valve—all of which are inseparably related in time and space so as to constitute an unbroken chain of causation.

In *Eglsaer* v. *Scandrett,* 151 F. 2nd 562 (CCA 7, 1945), which contains an exhaustive analysis of proximate cause under the Federal Employers' Liability Act, and which differentiated the "old fashioned idea" of proximate cause with the present interpretation of this term, the Court, through Circuit Judge Evans, at page 566 said:

> "The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For

> instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident. * * *"

See also *Tiller* v. *Atlantic Coast Line,* 323 U. S. 574, 65 S. Ct. 421; *Tennant* v. *Peoria & Pekin R. Co.,* 321 U. S. 29, 64 S. Ct. 409; *Carter* v. *Atlanta & St. Andrews Bay Ry. Co.,* 338 U. S. 430, 70 S. Ct. 226.

The Appellant also contends the evidence discloses no inherent danger in stopping of a freight train by means of a conductor's valve. Reid, however, testified the use of the conductor's valve in the caboose would always produce an emergency application of the brakes and a rough stop (App. 101, 103). Believing this and knowing that low pressure produced by his service application of the brakes shortly before, would make the emergency stop even more severe, Reid would be charged with the natural and probable consequences of his failure to stop the train after being told of the hot box. Everyone seems to agree that the situation there presented with a hot box smoking and blazing on a carload of paper was such a dangerous condition that it could have produced a wreck or derailment.

In *Coray* v. *Southern Pac. Co., supra,* the Utah Supreme Court discussed the distinctions between "proximate cause" in the legal sense sufficient to impose liability, and "cause" in the "philosophical sense", deemed insufficent to impose liability, and held that the stopping of train was, in the philosophical sense a condition upon which the negligence of the plaintiff's intestate operated and was therefore, not the legal cause of the result. The Supreme Court of the United States, at page, 277 said:

> "Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The Statute declares the railroads shall be responsible for their employee's deaths 'resulting in whole or in part' from defective applications such as were here maintained. * * * These air-brakes were defective; for this reason alone the train suddenly and

> unexpectedly stopped; a motor track car following at about the same rate of speed and operated by an employee looking in another direction crashed into the train; all of these circumstances were inseparably related to another in time and space. The jury could have found that decedent's death resulted from any or all of the aforegoing circumstances.''

The Appellant substantially increased the Appendix by use of medical testimony, which would only be relevant in the event the matter of damages was before the Court. If the Court had jurisdiction over this matter, the Appellee would have requested restoration of the $25,000.00 remittitur, because a man 29 years of age was injured so seriously that he had been unable to work for approximately 18 months; had lost $7,500.00 in wages to date of trial; had a spinal fusion and bone graft operation, requiring the use of bone from a bone bank and four metal screws, performed on his back, which proved unsuccessful and therefore did not relieve his pain; had worn a plaster cast for four months, and alternated between a steel brace and elastic corset; had a marked limp and was in considerable pain at time of trial. All doctors agree he was not able to return to work on the railroad and his physical activities would be limited to very light work. Dr. Gutman testified that his condition was permanent and another fusion operation might be advisable (App. 69). Certainly, in normal times, a man who is only able to perform the kind of work described b Dr. Gutman (App. 65) would have the utmost difficulty finding employment, and if he were successful could only hope to obtain it at a greatly reduced salary, comparable to that paid persons with his physical handicap. Assuming that he could not earn over $150.00 a month, his loss would be $300.00 a month, since his income on the railroad would have been $450.00. According to the annuity tables, offered in evidence by agreement (App. 96), it would cost $3,150.00 to buy an insurance annuity paying $10.00 a month, which would mean $94,500.00

to replace his $300.00 a month loss. This, added to his actual loss of salary to the time of trial, would equal $102,000.00, without taking into consideration any compensation for his pain, suffering, disability, or another spinal operation.

It, therefore, appears that the verdict of $75,000.00 was not extra-ordinarily large, as claimed by Appellant (Brief 29), but was insufficient to compensate him for his actual financial loss. It is submitted that the railroad was most fortunate in having had granted, a remittitur of $25,000.00.

V.

CONCLUSION.

To permit the Appellant to now, for the first time, raise the proposition that Section 1 *only* related to use of air brakes by the engineer, would enable the Appellant to profit by its silence, contrary to Rule 51, F. R. C. P.

In view of the obvious purpose of the Safety Appliance Acts, as enunciated by the Supreme Court, the attempt by the railroad to have this Court adopt reasoning that, under Section 1, railroads are required only to furnish air brake equipment which would operate safely when used by one man, the engineer, of a five man crew, where the air is pumped from the engine through more than a mile of cars to the conductor's brake valves on the caboose, seems such a twisted and distorted construction that the mere statemen of it is enough to preclude serious consideration.

The only excuse Appellant offers for the actions of the engineer in failing to look to see if the smoke, for which he had slowed down, had stopped before he opened the throttle and speeded up, was that his attention was devoted to blowing a whistle for a crossing (Brief 6). This simple operation, which could have been performed by either Reid or Bowie, the regularly assigned engineer (App. 98), is hardly justification for failure to stop a train in imminent danger of being wrecked. The defendant's counsel apparently realized this by saying that even if the engineer was negligent, there is no proximate cause. In the opinion of the Appellee, the only link that was necessary to complete the chain of proximate cause, was the knowledge on the part of Reid that those in the caboose would observe the rules of the railroad and the dictates of common sense and self-preservation, to avert disaster.

No reason has been shown for disturbing the verdict below.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAR 3, 1952

Joseph W. Stewart
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No. 11,211

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a corporation, *Appellant*,

v.

THOMAS M. BROOKS, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

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IN THE

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No. 11,211

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD
COMPANY, a corporation, *Appellant,*

v.

THOMAS M. BROOKS, *Appellee.*

Appeal from the United States District Court for the District of Columbia.

APPELLANT'S REPLY BRIEF.

The brief for Appellee merits no extended reply. The arguments which have been made in Appellant's opening brief need no reiteration or elaboration at this time. However, brief comment would seem to be in order on the new point made by Appellee with respect to the right of the railroad to argue the important Safety Appliance Act question. Also, liberty is taken of commenting briefly on certain purported quotations by Appellee from the statute, and those efforts of the Appellee to emphasize here, as at the trial below, certain irrelevant facts, both of which serve only to confuse the narrow issues here presented.

I.

Appellee's Contention That a Portion of Appellant's Argument on the Safety Appliance Act Comes Too Late.

The section, "Argument," in appellee's brief commences as follows:

> "A. *Claim of Error For Not Restricting Air Brakes to Use of Engineer Alone, Comes Too Late. Rule 51, Federal Rules Civil Procedure.*" (Appellee's Brief, 8)

This narrow point was not discussed in appellant's brief because it was clear in the record that appellant did object specifically to appellee's Prayer No. 1, which was based on Section 1 of the Safety Appliance Act and the alleged failure of the air brakes to function "*efficiently*" when applied by the *conductor* from the caboose, by use of the *conductor's valve.*" (App. 7, 227-235).

The question of the applicability or non-applicability of the entire Safety Appliance Act was first raised as a definite issue in the *pleadings,* when a violation of the Act was alleged in plaintiff's complaint and denied in defendant's answer. In defendant's answer, the distinction between the action taken by the *engineer* (assistant road foreman of engines) and the action taken by the *conductor* was clearly set forth (App. 2 and 5). Paragraph 6 of the answer admits "the acting assistant road foreman of engines was operating the Diesel engines pulling the train in question." Paragraph 8 admits "the Conductor stopped the train by applying the brakes from the caboose." (App. 5)

At the very beginning of the trial, before the jury was empanelled, the issues were discussed and the Court, addressing the appellant's counsel said: "You believe the evidence won't support the submission to the jury of the case under the Safety Appliance Act," to which counsel replied: "That is correct, your Honor" (App. 16).

Thereafter, evidence was taken through four days of trial. Motions for a directed verdict for the defendant were made and extensive argument was heard on this theory of the case. To contend now that any part of Section 1 of the Safety Appliance Act, a statute only eight lines long, escaped the scrutiny of Court and counsel is not to be realistic. The fact that the entire first section of the statute was in issue cannot be doubted.

The evidence adduced at the trial did not sustain the allegation of the complaint. Accordingly, a motion was made for a directed verdict on those *specific* grounds. (App. 227-230). As a result of the colloquy at the Bench mentioned above, all during the trial the Judge knew that such a *motion on those specific grounds* was going to be made at the close of the trial. The Court ruled on the question raised by appellant, saying:

> "The motion for a directed verdict on *each* of the *two* causes of action is denied" (App. 234)
>
> * * *
>
> "So far as (c) is concerned, that should be submitted to the jury on the first cause of action, namely, the alleged violation of the Safety Appliance Act." (App. 235).

The Court thus specifically denied appellant's oft-repeated assertion that there was no evidence of any violation of the Safety Appliance Act; that it clearly appeared from the evidence that there was no lack of control by the engineer of the speed of the train and that the brake system complied in every respect with the requirements of the Act. The appellant believes the Court's denial of the motion was erroneous.

As a result of, and logically following, the erroneous decision on the motion for a directed verdict, the Trial Court erroneously granted plaintiff's Prayer No. 1 (App. 7) over defendant's clear objection, which objection was in fact anticipated by the Court (App. 235). Therefore, Rule 51 cannot now be said to prevent the appellant from questioning on appeal the application of the statute to the facts brought out in evidence. No new defense nor any new question of law is involved in this appeal. The whole of Section 1 of the Safety Appliance Act was "inherent in the case." *Smith* v. *Gay*, 190 F. 2d 719, (C. C. A., 4, 1951).

This Court has recently had occasion to examine a situation comparable, in some respects, to the case at bar in *Montgomery* v. *Virginia Stage Lines, Inc.*, 191 F. 2d 770, — U. S. App. D. C. —, 79 W. L. R. 1296 (Case No. 10254). A quotation from *Williams* v. *Powers*, 135 F. 2d 153, 156 (C. C. A. 6, 1943) was included with approval in its opinion, as follows:

> " 'Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and *where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the* QUESTION OF LAW *involved, that is sufficient'.*" (Emphasis supplied)

It is clear from the foregoing that the crucial decision on Section 1 of the Safety Appliance Act was made by the Trial Court following the argument of the motion for a directed verdict. Thus, the last sentence of Rule 50, (a), rather than Rule 51, should be applicable to the appeal at bar. Rule 51 carries a specific prohibition against assigning as error the giving or the failure to give an instruction unless objection is made to it before the jury retires. Appellant asserts that the requirements of Rule 51 were met, but, in any event, the less rigid requirements of Rules 46 and 50 should be the proper measure of the propriety of argument on appeal of the point in question.

The whole of Section 1 of the Safety Appliance Act in all its aspects was at issue in the Trial Court. This appears from the pleadings, the colloquy at the Bench before trial, the argument on the motion for a directed verdict and plaintiff's Prayer No. 1 to which defendant made timely objection. Argument in this Court is proper on any phase of the application of the Act to the evidence adduced at the trial.

II.

Safety Appliance Act.

The keynote of Appellee's argument on the Safety Appliance Act may be found at page 10 of his brief where there appears the following comment on what purports to be a quotation from Section 1 of the Safety Appliance Act:

> " 'Appliances for operating the train brake system' *cannot be limited to the locomotive engine alone,* for the reason that each and every part of the train brake system fits together in an inseparable pattern, which can only function as an integrated apparatus . . ." (Italics added)

Starting with this self-made premise, Appellee refers at several places in his brief to the Safety Appliance Act as requiring "appliances for operating the train brake system" (Appellee's Brief pp. 15-16), and argues that the emergency valve is a part of that "system" (p. 13).

Of course, the Appellant's objection to these "quotations" from the Safety Appliance Act is that they omit the very words which Appellee then argues "cannot" be in the statute since, he argues, such words would defeat the liberal purpose of the statute. The statute specifically provides that it shall be unlawful for a railroad to use "*any locomotive engine* . . . not equipped with a power driving wheel brake and appliances for operating the train brake system . . ." No question is raised but what those appliances were furnished and were without defect. The express language of the statute does exactly what the Appellee says cannot be done. Any argument that merely characterizes our reading of the plain words used in the statute as "such a twisted and distorted construction that the mere statement of it is enough to preclude serious consideration" (Appellee's Brief page 31), warrants no further discussion.

III.

Proximate Cause.

Just as at the trial below, Appellee here insists on injecting into the argument an issue which is entirely irrelevant and an issue which was specifically ruled out by the court below (App. p. 239; p. 8). The appellee insists on painting a lurid picture of a "hot box smoking and blazing on a carload of paper . . ." (Appellee's Brief pp. 29, 8, QUESTIONS PRESENTED).

It will be recalled that the Appellant has admitted in its opening brief (pp. 23, 24) that a jury issue would have been presented on the question whether the engineer was negligent in failing to bring the train to an immediate stop after seeing the smoke, *if, but only if,* what developed to be a hot box had resulted in a derailment or other similar accident to the train, and injury had resulted therefrom. However, in the circumstances of the instant case, it must be perfectly obvious that the hot box, whether it was blazing or smoking, and whether it was on a car carrying paper or carrying any other substance, is entirely immaterial, and such was the ruling of the court below. Of course, no derailment or other similar accident occurred, and the car on which the hot box developed was removed from the train in a routine manner.

To be sure, the hot box may well have been the *condition* for the application of the brakes from the rear of the train. However, as is observed by the plaintiff at page 14 of his brief when he is discussing the Safety Appliance Act phases of the case,

> "Just why it isn't possible (if the brakes are operating properly) to get a smooth stop by use of the conductor's valve, no one has satisfactorily explained . . ."

In the absence of any satisfactory explanation, it is utterly inconceivable that any action or nonaction of the engineer could be expected to contribute to such an inexplicable result. Certainly the fact that an axle turned out to be "cherry-red" adds color, but not one iota of logic to an otherwise illogical premise.

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